

What supplier needs protection against unfair trade practices? 2/44/23



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The Competition Council has started monitoring retail markets in the wake of the recent high-inflation episode. Analysing this information provides insights into the relationship between retailers and suppliers and how this affects the market.¹ The Competition Council is soon expected to publish the data and findings derived from this monitoring, with more attention being paid to breaches of fair trade practices and prohibitions that buyers and retailers have to observe. While it's difficult to predict what this monitoring will yield, political pressure may lead to significant changes in this sector.

Subjects of the law

Unfair trade practices are governed by the Prohibition of Unfair Trade Practices Act (PUTPA), which governs suppliers, buyers and retailers of food and farm products, and non-food retailers. These subjects of PUTPA operate at different stages of the supply chain. PUTPA mainly aims to protect suppliers from the unfair use of retailers' buying power and to prevent unfair trade practices throughout the food and farm products supply chain. We can see that a different degree of protection is afforded depending on the line of business, i.e. non-food suppliers are less protected than food suppliers.

First off, let's see how these subjects are defined and how to determine whether they are governed by PUTPA:

- A supplier under PUTPA section 1(6) is a supplier of food and farm products or a person that sells goods to a non-food retailer. The rules protect the interests of these companies.
- A buyer is an entity that purchases food or farm products. Under PUTPA section 1(7) the law applies to this subject in two cases: if (1) its net revenue exceeds EUR 2 million or (2) it's a government agency. For example, a buyer governed by PUTPA is a catering chain or a wholesaler whose revenue exceeded EUR 2 million in the last financial year, or a public hospital when it's buying fruit. However, the definition of buyers includes retailers, too, because they buy goods from the supplier, but they are not governed by PUTPA unless they meet various other preconditions. Also, being singled out in the definition means they do not have to exceed a particular revenue threshold in the last financial year.
- A retailer of food and farm products under PUTPA section 1(4) is an economic operator or an association of economic operators that sell food and farm products at a permanent point of sale. Here the law does not provide for any further aspects nor does it set any revenue thresholds that would make it applicable, so any retailer of food and farm products that works with a supplier must comply with its requirements. Applying PUTPA presumes the retailer to have buying power against the supplier.
- A non-food retailer under PUTPA section 1(5) is an economic operator or an association of economic operators that sell goods other than food and farm products at a permanent point of sale. For the law to be applicable, we need to assess whether a retailer is able to directly or indirectly apply or force any unfair and unreasonable terms, conditions or payments on suppliers and whether he is able to hinder, restrict or distort competition in a particular

Latvian retail market, considering his buying power over a sufficient period and the suppliers' dependency in that market.

Determining a non-food retailer's buying power

As stated above, PUTPA applies only to non-food retailers that are able to directly or indirectly carry out unfair trade practices against suppliers. It's possible to determine whether non-food retailers are PUTPA subjects by evaluating a combination of two elements: buyer power and supplier dependency.²

To do this, we need to identify the relevant retail market and the relevant purchase retail market, which includes the need to identify the relevant product market and the geographical market. For the purposes of this assessment, we need to consider various aspects such as whether a product is replaceable and whether the buyer would choose a similar product if this one were not available. We also need to assess whether it's easy for the supplier to switch from manufacturing or supplying a particular product or group of products to manufacturing or supplying a different product or group of products.

Next, we need to evaluate buying power. This exists, for instance, if any of the following is true:

- The buyers/retailers market is more concentrated than the suppliers market, potentially allowing them to directly or indirectly force the terms of agreement.
- It's not difficult for a retailer to switch to another supplier, i.e. the retailers have plenty of suppliers to choose from.
- A retailer/buyer purchases large quantities of goods or has a large share of the market that allows him to significantly affect the supplier's business by putting him under pressure to accept unfair terms of trade.³
- Other aspects that help assess whether the buyer has power against the supplier.

Identifying the relevant market makes it possible to assess whether the retailer has buying power, as these two elements cannot be evaluated separately.

Each case and each group of goods in a particular market needs to be assessed on their own merits, so non-food retailers are advised to regularly monitor their buying power against suppliers. This can be done by setting up risk assessment mechanisms that use standardised questions to quickly and efficiently assess whether you have buying power against a particular supplier and have to comply with the requirements of PUTPA section 6.

Trading in food and farm goods – case law

Findings made in the Supreme Court Administrative Division's ruling No. SKA-54/2022 of 1 February 2022⁴ make it clear that when evaluating a breach, the Competition Council is not supposed to assess whether buying power actually exists because it follows from the explanation and definition of the term in PUTPA section 1(4) that the law applies to any retailer. Here we can see a difference from the term 'non-food retailer' because under PUTPA section 1(5) the law will apply only to non-food retailers that have buying power.

PUTPA aims to restrict retailers' buying power against a supplier, and the court ruling states that to punish retailers that do not have such buying power and have reached their terms by agreement based on equal positions of the parties would defeat PUTPA's objective. So we need to bear in mind that a retailer of food and farm products cannot be punished if he has no actual buying power against a supplier. However, the

Supreme Court's finding needs to be assessed critically because it points to a heavy burden of proof.

Liability

On detecting a breach of fair trade practices, the Competition Council will decide to impose a legal obligation, a fine, or a warning. A fine is charged according to the Competition Act, and the procedure for computing it is prescribed by the Cabinet of Ministers' Rule No. 179 of 29 March 2016.

Setting up risk assessment mechanisms and monitoring your impact regularly, and in some cases paying attention to whether your revenue for the last financial year exceeded the PUTPA threshold, will allow you to develop your business without being fettered by inapplicable statutory requirements, or on the contrary, identify the need to comply with PUTPA early on and act accordingly, thereby avoiding a fine charged by the Competition Council.

¹The Competition Council scrutinises the retail market for household consumer goods. Available: [here](#)

²The Competition Council's guidelines 2022 on applying the Prohibition of Unfair Trade Practices Act, paragraph 235. Available: [here](#).

³Ibid, paragraph 245

⁴The Supreme Court Administrative Division's ruling No. SKA-54/2022 of 1 February 2022, paragraphs 6-11. Available: [here](#).