

Unfair practices in distribution

Practical experiences of the law pertaining to the prohibition of unfair practices in the distribution of agricultural and food products

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The aim of the act



- On October 12, 2009 **the Hungarian Parliament passed the Act XCV of 2009** on the prohibition of unfair practices in the distribution of agricultural and food products **without any opposition.**

The law came into force 1 January 2010.

- The purpose of the law is to regulate the marketing practices for agricultural and food products in order to provide a **balanced market bargaining position**, to enforce the standards of **ethical business conduct** and **strengthen mutual trust.**
- Based on the designation of the Hungarian Government is the **National Food Chain Safety Office** as the acting authority.



The scope of the Act



Personal scope

- Established by the trader, or the **seat, premise of the supplier** located in Hungary.
- The investigation **can be extended** on other stakeholders. (related investigation)
- The investigation can be conducted, **if one of the stakeholders falls within the scope of the Act.**

Objective scope

The investigation can be conducted,

- if the market relationship between the parties incarnates distributor conduct.
- if the market relationship between the parties applies to the obligations prescribed in this statutory or by the authority.



The main elements of the act



- Preamble, 6 section, 10 §
- General provisions – scope of the act and definitions
- **The substantive determination of Unfair Trading Practices (some of the prohibited practices, regulations of contractual services, business rules)**
- **Procedural Rules** (ex officio proceeding, suspension of proceeding, administrative time according to the provisions of the Act on the General Rules of Administrative Proceedings and Services, entitlements of control, redress procedures)
- **Participation of Interest Representation Organizations**
- **Legal Consequences Applicable in Cases of Infringement of the Prohibition of Unfair Trading Practices** (determination of the amount of the fine, the payment in decision, commitments in injunction)
- **Closing Provisions** (The Government is authorized to designate the agricultural administration body)





Classification of Unfair Trading Practices

- Unfair trading practices are **prohibited**.
- **Unilaterally advantageous** terms and conditions (13 point)
- Charging or devolving the **subsequent costs**, which cannot be objectively verified (5 point, services, bonus)
- **Absence of accounts** with the supplier (9 point, eg. special offers, the period of payment, compensation)
- **Other unfair trading practices** (3 point, eg. selling below first- and/or purchasing cost, selling on discriminating price)
- Deviation from the **business rules** and from their application (5 point)



The most common unfair trading practices



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*During the **inspections ex officio** that were carried out from the second half of 2010 to present days, the most common unfair trade practices were the following:*

- Fee accounted for not used service (fixed bonus), from the 1st of February 2012, appraised as a separate conduct.
- Product counter value paid after 30 days.
- Discount accounts. Imposing higher discount rates and long-term supplier's consent.
- Passing the costs of actions benefiting the trader's business upon the supplier, prohibited use of background conditions
- Unfair practices concerning business rules

The most common pretense of the official controls in **cases of requested proceedings**: selling below purchase price, discriminatory pricing, prohibited use of background conditions



Unfair trading practices



Fee accounted for not used service

- Sales-related activity for the final consumer, but for the supplier, it has no actual additional services. Including the payment for the trader, that ensures the supplier, that the products will be placed at specific placement(s) in the trader's warehouse or store (slotting allowances), mandatory usage of non requested services, and services that don't serve the interest of the supplier (eg. family day).
- Fee calculation not proportionate to the measurement of the service or with services used. (unique summing up)

During the official investigation the traders could not present the background contracts and the verification of performance in connection with the services. They could not prove that services that were actually provided.

The application of fixed bonus judged the NFCSO to 31. January 2011, but based on the experience of the official controls an amendment was enforced that clarified the definition of bonuses.



Unfair trading practices



Applying bonuses

The act clarified the definition of bonuses and the fixed bonus has been classified clearly to the unfair trading practices in 2011.

- The agreement regarding **the progressive bonus** payment is considered as fair trading conduct, if the following conditions are satisfied.
 - it is based on extra performance and realistic sales requirements
 - the accounting is in accordance with the specified periods defined in the conditions
 - the discount rate is realistic and proportional with the product's commercial properties
- Fixed bonus without sales surplus performance is unfair.
 - The sales requirement is underestimated and functions as fixed bonus, until the supplier reaches the real sales traffic.
- More than one bonus can not connected to the same sales target.
- The advance payment at the payment of bonus is considered as unfair conduct.



Unfair trading practices



Payment after 30 days

The trader must pay the product price to the supplier within 30 days after the product takeover, the same is true if the trader received the bill within 15 days after the product takeover and in case of factoring and sales price.

- Compensation account is enforceable under detailed conditions.
- The incorrect bill shall be sent back within 5 days.
- When the bill is received 15 days after, the trader must pay in 15 days of its receipt.
- Payment day shall be the day when the trader account is debited.
- The fee charged for bank transfers – charged before the payment deadline - is unfair.



Unfair Trading Practices



Discounted accounts

Discount will be offered by the trader either risking margins or the trader initiates together with the supplier. In the last case the supplier gives an extra discount from the original price. During the discounts -with the supplier's consent- it shall be construed as unfair trading practices, if:

- The supplier requires to contribute to any discount granted by the trader to final consumers, for a duration longer than providing such discount to consumers, or for a quantity greater than originally agreed upon, requesting the supplier's contribution in excess of the discount granted by the trader to final consumers
- Within 30 days after the closing of a special offer, the dealer is accountable to the supplier regarding the discount. The exception is the case of net sales revenue of HUF 100 million retailers below.
- The summing up of persistently low price is equal to the sales price.



Unfair trading practices



Costs related to operation passing on the supplier

- The passing of costs – that are serving the trader's business interests – partly or wholly on the supplier directly or with the requisitioning of a third party. These types of costs can be the function-related costs: overheads, rentals, **operation-related costs**: ex. logistical contributions, business establishment-, shop opening-related costs: so-called expansive fees.
- Because of the occurring **additional costs** due to the violation of law committed by the trader, additional costs cannot be transferred to the supplier.
- The trader's **own brand** costs (procedure of testing and approval) can be shared between the trader and the supplier.
- The **quality management audit** (ordered by the trader directly, or performed by the third party) costs can be shared in proportion with the supplier.



Unfair Trading Practices



Business rules, general contract conditions

- **It is mandatory to have**, if the trader's income was more than net 20 billion HUF in the previous year.
- **It is mandatory to publish** and send the information to the agricultural administration organization.
- **It should include** the contents of services available, the highest fee and the conditions of entering and leaving the scope of suppliers.
- **The amendments must be published** and sent to the National Food Chain Safety Office.
- The Office (NFCISO) may prohibit the trader to apply the provisions listed in the business rules.





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Unfair Trading Practices

Selling below purchase price

- The enforcement of the product transfer cost billed by the supplier, and the enforcement of consumer prices below the cost price are considered as unfair distributor conduct. Exceptions: termination of activities, profile change, selling not full value goods.
- The exception can be applied for 15 days, and must be reported previously at the National Food Chain Safety Office.



Unfair Trading Practices



The prohibition of discriminative price

- UTP is setting **the retail price charged** to the final consumer of products **discriminatively, on the basis of the country of origin of products** considered identical on the basis of their composition and organoleptic properties.
- The consumer price content the net purchase price, the margin and taxes. The sale price are determined by **the purchase price** of the collectively bargained product between the market participants, it is different in greatness **does not have an effect on the discriminative pricing.**
- If it holds true, the character and measure of the discriminative, that the forming of the margin of the products originating from the different countries may only be done in **the same principled extent.**



Amendment



- **Personal scope** – The definition of trader and supplier was changed from 01.08.2012
- **Pretences** – additions and new pretences have been added to the law between 01.02.2011-01.08.2012 (eg. selling below purchase price, progressive bonus, discriminative price, control of Public health product fee)
- **Proceedings** – Four major changes (the amount of the fine has been determined in the case of selling below the purchase price, the obligation of suspension applies only for the duration of the ongoing process of co-authority at the parallel official controls, extension of the rules concerning commitment
 - introduction of new elements (possibility request for making statements of specific data, register, administrative penalty may be imposed upon the client, the supplier may consent for the collection order fulfillment, definition of final consumer has been modified)



Procedural Rules



The initiation of procedure

- Based on notification or ex officio
- Extended investigation can be carried out in case of notification based procedure, if the inspectors detect an unreported violation.
- Investigation can be carried out at suppliers concerning collection of data.

Completion of procedure

- Proceedure eliminating injunction
- Injunction to fulfill the required commitment
- Product chain management fine imposing decision. (in the case of small and medium-sized enterprises may apply authoritative warning because of violation.)

Legal remedy

- Can be requested in court procedure



Commitment



- Special case of closing proceeding. The proceeding can be closed with injunction, that the authority requires **the fulfillment of commitments** without stating in the injunction, that the infringement has occurred or not.
- This type of **injunction** does not rule out, that a new proceeding can be filed.
- **Follow-up inspections** – control of the fulfillment of commitment and it can be close with termination of a follow up inspection, or with an imposition of product path supervisory fine.
- According to the act in the section legal consequences the trader inspected may commit within ten days, but within that time limit the definitive decision may not be adopted. The decision may not be made if: the commitment of the trader affected does not cover all findings of infringements, and if previously a decision was adopted, product path supervisory fine was imposed or the infringement resulted in massive harm or damage.



Experiences of the investigation



- The NFCSO reached with the continuous checks and consistent implementation of this act, that cleaner and **more transparent** relations are formed between the main stakeholders and they apply **more regulated trading practices**.
- **The imposition of product path supervisory fine** was with significant effect to the abandonment of the unfair trading practices by the traders. The law-abiding practices are improve dramatically.
- The suppliers courageously represent their interests in the negotiations, they fixed **the differences of their opinion** in writing in the contract.
- It could occur during the official controls, that **the trader paid back** the offset of the improperly billed services.



Experiences of the investigation



- The selling below first- and/or purchasing cost drastically reduced.
- The law-abiding practices have improved in the case of payment deadline (30 day), the number and the value of delay of paid accounts reduced, it shortened the duration of the delay.
- The application of bonuses significantly improved, practically the application of fixed bonus ceased because of the effect of official controls
The supplier does not have to pay an advance in the case of progressive bonus.
- The traders organise the discounts at their own risk.
- The business rules are public, the transparency and the controlling has increased.



Experiences of the investigation



- Based on the complaint of the NFCSO and the traders, most of the decision was investigated at the **Review Court of Hungary**
- The review court accepted, considered and justified the statements of the decision of the NFCSO in the judgments.
- The notifications have increased steadily by **the Interest Representation Organizations.**
- Everyone can follow the decision, the applied sanctions, the business rules and the professional materials on **the website of NFCSO.**
- **The traders** adapt very quickly to the regulation, they **lead new techniques** in order to maintain profit, which means a challenge for the staff of NFCSO.
- **The objectives of the Act can be made available** by consistent, regular official controls and with legislative work, which can follow the changes of the trading of agricultural and food products and their business operators.





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Thank You for your Attention!

