



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

Deputy Director-General, in charge of Directorates G, H and I

Brussels,
AGRI.DDG3/G1/- [Art 4.1 (b) - privacy] (2020)
616672

By Email Only

[Art 4.1 (b) - privacy]

Thank you for your questions of 7 January 2020 on the implementation of the Directive (EU) 2019/633 on unfair trading practices ('the Directive').

Question 1

With your first question, you inquire what income of a legal person or a group of legal persons should be considered and calculated in the annual turnover. You are ultimately asking whether you should calculate all income or only the turnover related to the sector, for instance, the sale of agricultural and food products.

In Article 1 (2), the Directive refers to the SME Recommendation for turnover purposes and in particular to Articles 3, 4 and 6 thereof.

The annual turnover is determined by calculating the income that an enterprise received during the year in question from the sale of products and provision of services falling within the company's ordinary activities, after deducting any rebates. The turnover should not include value added tax (VAT) or other indirect taxes¹.

For the turnover, one should not rely only on the turnover derived from the agricultural and food products, unless these are the only ordinary activities, since this is not the only income that would determine a company's capacity to pay in time or fulfil any of the other requirements of the UTP Directive.

Question 2

With your second question, you are asking for the interpretation of the notion "subsequent agreement" used in Article 3(2) of the Directive. Article 3(2) allows certain trading practices, if they are previously agreed in clear and unambiguous terms in the

¹ European Commission, User guide to the SME Definition, 2017, p. 13, referring to Article 28 of the Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, pp. 11-31).

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supply agreement or in a subsequent agreement between the supplier and the buyer. You would like to know whether the subsequent agreement still has to be signed, or agreed upon, *before* the prohibited requests of the buyer or whether it is possible, based on this article, for the buyer to legitimise his request to the supplier to pay for advertising or marketing, with an agreement after he made those requests.

According to Article 3(2) of the Directive, the trading practices listed therein are prohibited, unless they are *previously* agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer.

Therefore, no matter if in the supply agreement or in the subsequent agreement. The trading practices listed will be prohibited unless agreed beforehand.

We draw your attention to the fact that ‘signature’ is not necessarily needed, as the Directive does not require the agreement to be necessarily in writing.

Question 3

With your third question, you are referring to the “mutual assistance” in investigations that have a cross-border dimension. You would like to know in particular what kind of international cooperation provisions should be implemented in national regulations implementing the Directive.

According to Article 4(3) TEU, the Member States and the Union shall in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The aforementioned article is reflected in Article 8 of the Directive. According to that article, the enforcement authorities shall cooperate effectively with each other and with the Commission. They shall also provide mutual assistance in investigations that have a cross-border dimension.

The Directive does not provide for any concrete mechanism on how decisions by an enforcement authority located in one MS should be executed against a buyer in another Member State. The Member States might rely on any existing bilateral administrative agreements which provide for such cooperation or examine which routes of cooperation with other enforcement authorities exist under national law.

The enforcement authorities shall meet at least once per year to discuss the application of the Directive, on the basis of the annual reports referred to in Article 10(2) of the Directive. They shall *inter alia* discuss best practices and shall exchange information, in particular on the implementing measures that they have adopted in accordance with this Directive and on their enforcement practices. Lastly, they may adopt recommendations in order to encourage the consistent application of this Directive and to improve its enforcement. This forum will provide an opportunity to exchange the experience about the mutual assistance in cross-border cases.

Question 4

Based on the wording of the Directive in recital 34 that ‘fines may be particularly effective and dissuasive’, with your fourth question, you inquire what level of fines would be considered effective. You are asking whether a percentage of turnover or a fixed amount would be more in keeping with the objectives of the Directive.

The Directive, respecting the minimum harmonisation rule, does not determine the level of fines to be imposed. Depending on the particularities in each Member State, both a fixed amount and a percentage of a turnover could be considered as effective and dissuasive. The variations in the different Member States are noteworthy as regards both (minimum and/or maximum) thresholds and the possible amount of fines.

The Member States and the enforcement authorities are free to decide on the level and calculation method of fines, as long as the fines and the penalties in general are effective and dissuasive in the sense that they make possible the effective enforcement of the Directive.

Question 5

With your fifth question you are seeking for clarification on when the starting point of the payment period is; you are in particular asking whether the term ‘delivery’ used in the Directive (EU) 2019/633 means the same as the term ‘receipt’ used in the Directive (EU) 2011/7 as you would like to harmonise the two Directives.

It should be pointed out that the objectives of the two Directives are not identical, as the Directive 2011/7 has as its objective to establish late payment interests, while the Directive 2019/633 has as its objective the prohibition of unfair trading practices.

As you rightly state, Directive 2019/633 does not use the term ‘receipt’, but rather uses the term ‘delivery.’ As can be seen from the formulation ‘whatever is the later date’, Article 3 (1) (a) intends to calculate the payment deadline of 30, respectively 60 days only from that point in time, when the buyer both knows which the amount of payment is and when the delivery took place. The rationale of that provision is to only subject the buyer to a respect of strict payment deadlines (with the consequence of a finding of committing an unfair trading practice subject to fines) as long as both events have occurred. For that reason, it seems legitimate to consider that a national law which interprets the notion of ‘delivery’ as ‘receipt of goods’ is in line with the Directive.

We are however not fully certain on the implications of your national definition with regard to the possibility of the buyer having the authority to ‘dispose’ of the goods² and cannot pronounce a view on that. However, in a situation in which the buyer can dispose of the goods without objection from the supplier, even if he is not in physical possession of the products, we would assume that the buyer is in the same situation as a buyer who received the goods physically. If at that moment also the amount payable is established, the triggering events for the calculation of the payment deadline seem to be fulfilled.

² Definition of the term “receipt of agricultural and food products” as “a moment when according to an agreement a supplier (seller) gives agricultural and food products to a buyer to dispose or agrees that a buyer starts disposing them”.

Question 6

With your last question, you are asking whether the payment periods of 30 or 60 days should also include the duration of agricultural products' pricing, meaning according to your national law a 'time period needed to evaluate the quality of agricultural products and accordingly calculate the payable amount to the supplier (seller)'.

The Article 3 of the Directive contains the "black" practices that are considered to be unfair by their very nature. Article 3(1)(i) contains the prohibition of payment later than 30 days for perishable agricultural and food products, as well as the prohibition for payment later than 60 days for other agri-food products. Those deadlines cannot be prolonged.

The Directive aims to harmonise the payment deadlines and does not touch upon the issue of the time needed to evaluate the quality of the products to calculate the payable amount. There is no obligation imposed by the Directive to include the time needed for the pricing of the products in the stricter deadlines. Including that amount of time in those shorter deadlines, without extending them, would still respect the minimum harmonisation rule, as the aim of those deadlines is to ensure the payment within the 30 and 60 days respectively, therefore, the Member States can introduce stricter rules.

However, if such an inclusion of the time needed for the evaluation and calculation of the pricing has or is likely to have as an outcome the extension of the aforementioned deadlines, this would not be in line with the Directive and would not respect the minimum harmonisation standard of the Directive.

The present opinion is provided on the basis of the facts as set out in your email of 7 January 2020 and expresses the view of the Commission services and does not commit the European Commission. In the event of a dispute involving Union law it is, under the Treaty on the Functioning of the European Union, ultimately for the European Court of Justice to provide a definitive interpretation of the applicable Union law.

Please be advised that we intend to share your questions and our replies with other Member States via the CIRCABC system so as to facilitate the consistent transposition of the Directive. Doing so, we will redact any personal information.

Yours sincerely,

Michael SCANNELL
Acting Deputy Director-General

Cc: [Art 4.1 (b) - privacy] Lithuanian Ministry of Agriculture