



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

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

Brussels, 18 November 2020
AGRI.DDG3/G1/ [Art] Ares (2020)
6882654 4 1
BY E-MAIL ONLY

[Art 4.1 (b)-Privacy]

Thank you for your email of 28 October 2020 on the implementation of the Directive (EU) 2019/633 on unfair trading practices ('the Directive').

In your email you inquire about the meaning of certain notions in the Directive and also ask for meaningful examples. In my reply below I will group certain notions together.

Advertising/advertising services and marketing

You ask for further clarification on the meaning of 'advertising *services*', 'advertising', and 'marketing'. Regarding the notion of 'services', Article 1 of the Directive clarifies that the Directive covers the services referred to in Article 3 of the Directive, which are provided by the buyer to the supplier. Article 3(2)(d) and (e) deal with advertising and marketing services of the buyer, for which the buyer can ask for a payment from the supplier, should the parties have agreed on such a practice in clear and unambiguous terms beforehand.

As already explained in replies to other Member States' requests (letter to Denmark of 12 April 2019), during the legislative process it was mentioned that 'advertising' is often described in the literature as a sub-element or individual component of a wider concept of 'marketing', which is often more comprehensively understood to cover an entire and systematic strategy (e.g. even including marketing research, or a marketing plan) and a mix of concrete implementing measures (such as radio advertising or newspaper placements) aimed at increasing sales of a product to an audience.

In any case, I should assume that the legislator, by choosing to have the terms appear in different sub-provisions of Art. 3(2) of the Directive intended to be comprehensive and not leave any such activities uncovered.

Retaliation

Article 3(1)(h) of the Directive prohibits as an unfair trading practice the (threat of) commercial retaliation if the supplier exercises contractual rights or legal rights.

[Art 4.1 (b)-Privacy]

Ministry of Rural Affairs of the Republic of Estonia
Agricultural Policy Department
Agro-Food Sector Development Bureau

[Art 4.1 (b)-Privacy]

Such a threat could e.g. be that the buyer refuses payment for products delivered or fails on other contractual obligations, if the supplier e.g. files a complaint on the buyer's behaviour with the enforcement authority. Suppliers sometimes also report that the buyer threatens to end contractual relations under a long-term contract, if the supplier takes or threatens to take legal action.

In practice it will have to be established in the concrete case whether the buyer's behaviour is indeed an act of 'retaliation' in reaction to the supplier's exercise of rights or whether the buyer just avails of contractual rights or his freedom to contract.

Payments not related to the sale of agricultural and food products

You inquire about Article 3(1)(d) of the Directive with regard to what would constitute an 'unrelated payment'.

As stated in replies to other Member States (letter to Latvia of 26 February 2020), Article 3(1)(d) prohibits the buyer from requesting payments from the supplier for which there is no service offered. Whereas e.g. the supplier might pay the buyer for the service of listing or displaying the product, the payments according to Article 3(1)(d) of the Directive are payments for which there is no such service provided by the buyer.

Quality standards

The notion of 'quality standards' is referred to in the context of the prohibition for the buyer to unilaterally change the terms of the supply agreement, Article 3(1)(c) of the Directive.

Quality standards in this context are not limited to quality standards as defined in agricultural legislation, e.g. Regulation (EU) No 1308/2013, but refer to any standard of quality for a product, which the parties agreed upon – e.g. the ripeness of a fruit, the requirement for the product to be free of bruises, etc.

Other notions

Regarding your query on 'logistics services', we are not certain to which provision or recital of the Directive you refer to. We would therefore invite you to raise the question in the upcoming meeting we will have with Member States on 10 December 2020.

The present opinion is provided on the basis of the facts as set out in your email of 28 October 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 faithfully,

(e-signed)

Michael SCANNELL

c.c.: [Art 4.1 (b)-
Privacy] Ministry of Rural Affairs of the Republic of Estonia