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[Art 4.1 (b)-Privacy] Ares (2020)

3977485

BY EMAIL ONLY

[Art 4.1 (b)-Privacy]

Thank you for your questions of 29 June 2020 on the implementation of the Directive (EU) 2019/633 on unfair trading practices ('the Directive')

In your email you raise several questions with regard to the definition of unfair trading practices, but also on enforcement.

Perishable Products and payment deadlines under national law

With your *first question*, you would like to know whether it is possible for Member States to have a more specific definition of 'perishable products' than the definition laid down in Article 2(5) of the Directive. You point out that in Bulgarian legislation, it is possible to have shorter deadlines than the 30 days stipulated in the Directive for '*extremely* perishable products'.

Member States, when transposing the Directive, have to respect the minimum harmonisation standard of the Directive, which also includes the definitions as provided in Article 2 of the Directive. As already mentioned in other letters to Member States, it must be ensured that all products which qualify as 'perishable' in the meaning of Article 2(5) will then be paid within the payment period provided in Article 3(1)a of the Directive and Article 3(1)(b) for short order cancellation also would have to apply to all perishable products as defined by the Directive.

However, as the Directive does not object to a Member State applying stricter rules than the Directive, under the conditions laid down in Article 9 of the Directive, national legislation can also provide for shorter payment periods than those of Article 3(1)(a) of the Directive. For this situation of a stricter national provision, Member States can also develop definitions for the category of products which fall under these stricter national rules. However, these national definitions cannot be used to alter the scope of application

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of the Directive, e.g. with regard to payment periods or order cancellations of perishable products.

Enforcement in case of danger of revelation of business secrets

With your *second question*, you inquire how the enforcement authority should deal with a situation in which there is a risk that during an investigation the identity of a complainant or any other sensitive information about the business of a complainant would be revealed. You ask whether the enforcement authority should close the proceeding or suspend them.

This question is difficult to answer in the abstract and up to the discretion of the enforcement authority. Both options of closing the proceedings or suspending them for a certain time, are viable options.

Alternatively, the enforcement authority could consider whether the possible infringement of the buyer could be pursued as an ex officio investigation, without revealing the source of the investigation and without compromising other business secrets. Maybe other suppliers, or suppliers as represented by their organisations, according to Article 5 of the Directive, might come forward to complain about similar concerns.

Definition of ‘making a product available on the market’, Article 3(2)(b) of the Directive

With your *third question* you refer to Article 3(2)(b) of the Directive and the meaning of ‘making a product available of the market’. You also inquire whether this notion is similar to the ‘marketing’ of products under Article 3(2)(e) of the Directive,

‘Making a product available on the market’ is a wide notion and is neither limited to the first placement of the product on the market, nor is it limited to a certain part in the agri-food supply chain, i.e. the notion is not limited to supplier payments to retail buyers for making the product available to end-consumers.

It is different from the notion of ‘marketing’ in Article 3(2)(e) of the Directive. ‘Marketing’, as explained in other letters to Member States, rather refers to a structural commercialisation strategy, containing many elements, such as e.g. advertising for a product, but also market research or a marketing plan. ‘Making a product available’ is rather to be seen in the context of the other notions such as ‘listing’, ‘displaying’ or ‘stocking’ in Article 3(2)(b) which rather refer concrete products and quantities being integrated either in the buyer’s product list or for displaying on the shelf and for stocking in premises.

The present opinion is provided on the basis of the facts as set out in your email of 29 June 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,

(e-signed)
Michael SCANNELL