



Brussels, 22 July 2020

[Art 4.1 (b)-Privacy] D(2020) 3863568

BY EMAIL ONLY

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Thank you for your questions of 26 June 2020 on the implementation of the Directive (EU) 2019/633 on unfair trading practices ('the Directive').

In your email you raise firstly questions as to some of the notions referred to in Article 3(2) of the Directive. With your second question you wish to receive further explanation on the cost estimates which the buyer is obliged to give to the supplier upon request in accordance with Article 3(3) of the Directive.

### **Definition in Article 3(2) of the Directive**

With your first question you inquire about the meaning of 'stocking', 'displaying' 'listing' and 'making a product available' on the market according to Article 3(2) of the Directive.

The Directive does not further define these notions.

However the following reflections of the Commission services might be of interest for your process of drafting the national transposition legislation.

For the notion of 'stocking' there is in particular no specification on the location where the stocking of products is supposed to take place. However, compared to 'listing', 'stocking' would be a notion which relates to the physical presence of a product, which would also include the storage of such goods.

'Listing a product' is normally understood as the integration of the product on the buyer's list of products which the buyer intends to further market or sell to other trading partners or e.g to end consumers in a retail outlet. It can be understood to mean integrating the product into the buyer's portfolio of products for further resale.

'Displaying' is normally understood as putting the goods on the shelves for sales.

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

### **Payments and cost estimates according to Article 3(3) of the Directive**

With your second question you basically wish to know

- i) whether the payments that a buyer can demand from a supplier must be related to the costs, and in particular whether these payments are limited by these costs or could be (much) higher than the underlying costs;
- ii) how detailed any payments and cost estimates which the buyer is obliged to give in writing must be;
- iii) who ultimately will decide about whether the payment and cost estimates to be given according to Article 3(3) of the Directive by the buyer are adequate.

We would like to recall the rationale of Article 3(3) of the Directive as a provision which aims to create transparency for the supplier in situations in which the buyer asks the supplier for a contribution for services provided by the buyer, as described in Article 3(2) of the Directive. The provision should enable the supplier to make a well-informed decision - based on information provided by the buyer – concerning his willingness to financially contribute to services offered by the buyer on the basis of the known “price tag” for this, or rather not accept to enter into the transaction.

The Directive does not regulate prices or payments by the supplier. Neither does it relate the payment asked from the supplier to the underlying costs which would prevent the buyer from charging ‘higher’ payment. The parties’ freedom to agree on prices for services is not limited by the obligation to communicate payment and cost estimates.

Your further question on how detailed such payments and cost estimates should be, is difficult to answer in the abstract, also taking into consideration that the buyer might not want to reveal all of his internal costs. As you point out, recitals (26) and (27) of the Directive require the buyer to provide objective and reliable estimates for the supplier’s contributions. It will depend on the parties’ understanding or customs of the sector if payments are normally demanded overall or per unit. Likewise it may prove sufficient that the buyer relies on standard costs e.g. for printing, advertising costs, without revealing whether he was able to source printing/advertising input at a lower price than the market price. Administrative costs can be part of this cost calculation, but would be expected to be identified towards the supplier as a cost item if the supplier asks for a cost estimate.

The above parameter would be taken into account by an enforcement authority if it had to assess a related complaint by a supplier.

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The present opinion is provided on the basis of the facts as set out in your email of 26 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