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(b) -

[Art 4.1 (b) - privacy]

Subject: Your letter of 8 February 2019 concerning the implementation of the UTP Directive

(1) Scope of products

Article 2 of the Directive contains the definition of the covered products. Accordingly, products under Annex I TFEU are covered as are products not listed in that Annex but processed from them for use as food. Regulation 510/2014 also covers products that are not made of Annex I products, e.g. mineral waters (2201 10). Alternatively, feathers (ex 0505) for example would not be a product for food use. This is why that regulation cannot be mechanically used for verifying whether a product is covered by the Directive. But it can give an indication of the processed agricultural products that are covered.

(2) Scope of operators

a) Mid-range

Article 9 of the Directive enshrines the right of Member States to pursue more ambitious rules governing unfair trading practices than foreseen in the Directive (“higher level of protection”). Therefore, additional brackets can be introduced at the national level as this would enlarge the circle of operators, which are protected.

b) National or global presence and agricultural turnover

Article 1(2) second sub-paragraph of the Directive stipulates that the turnover of suppliers and buyers is determined in conformity with the definition of SMEs as set out in Commission [Recommendation](#) 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium- sized enterprises (OJ L 124, 20.5.2003, p. 36).¹ From this derives that the global presence of a given undertaking is to be taken

¹ See also User guide to the SME definition, http://ec.europa.eu/growth/content/revised-user-guide-sme-definition-0_en

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into account when establishing its turnover for purposes of Article 1(2) first subparagraph. The thus established turnover is specific to the undertaking and not determined on the basis of sector- or product-specific considerations.

(3) Definition of perishable food products

The Directive lays down the relevant criterion for determining whether a product is perishable. An enforcement authority will need to apply this criterion to the case at issue based on the national transposition rules. A Member State's transposition must rely on the said criterion and cannot substitute another criterion for it.

(4) Aid schemes

Aid granted is by definition not tantamount to the payment of a sales price. This is why a general exception for all aid schemes is not necessary; the Directive does not apply in the first place. In case of the School Scheme, the scenario may arise that schools are the aid applicants: the paying agency disburses the aid to the school, which then pays a third operator for the product supplied. The aid disbursement from the paying agency to the school does not fall under the Directive. The payment of a (public) school to a supplier would however, come as matter of principle under the scope of the Directive if the corresponding exception was not foreseen. This may have given rise to the school's payment to the supplier being due, because of the Directive, *before* the aid payment to the school occurs. Certain Member States in the Council opposed this effect of the Directive and this accounts for the exception. Having said this, the Directive does not change the existing regime under the Late Payment Directive for payments. Under Art. 4(3) of the Late Payment Directive the applicable payment delay for public authorities is normally 30 days (Art. 3 of the Late Payment Directive applies to private undertakings).

Under Art. 4(4)(b) of the Late Payment Directive, Member States can decide that public authorities providing health care can have a 60 days payment delay (this provision is also not affected by the Directive on account of a further exception provision in Art. 3 of the Directive).

(5) Cancellation in certain sectors

During the legislative process, a target of 30 days or more concerning lawful cancellations was deemed too long, considering the characteristics of certain perishable products. In some sectors, orders are passed without a previous framework contract and at very short notice.

For that reason, the co-legislator decided to grant Member States explicitly the possibility to adapt this UTP rule thereby reducing the extent of the protection. However, this must concern a specific sector and there must be a sector-specific justification given for such shorter-term order cancellations.

(6) Two or more authorities have competence to enforce

The Directive does not contain case allocation rules. *'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties [...]*' (Article 4 (3) of the Treaty

on the European Union (TEU). It is against this framework that the matter would be discussed and handled.

(7) “ ... provided that such organisations are independent non-profit making legal persons”

During the legislative process, it was discussed that also organisations other than producer organisations or other supplier organisations should be enabled to bring a complaint in the interest of a supplier. The word ‘independent’ in this context was meant to distinguish these entities, that could be considered as having a legitimate interest in defending suppliers’ interests, as it is the case e.g. with non-governmental organisations, from those bodies which would already qualify as a supplier organisation.

Normally the statutes of an organisation should be indicative of its profit making character. In such case, “engaging in a full review of accounts” would normally not be necessary.

(8) References to services

Yes, the references you mention would be ones to the practices that cover the service-type related activities mentioned in Art. 3(2).

(9) Promotion, advertising and marketing

At first glance it is indeed not straightforward to conceptually and operationally demarcate the terms advertising and marketing from each other so that overlaps are avoided. During the legislative process it was discussed that “advertising” is often described in literature as a sub-element or individual component of a wider concept of “marketing”, which is often more comprehensive and 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.

“Promotion” may be seen as a more clearly distinct activity. The reference to a “discounted price” in Art. 3(2)(c) would suggest that “promotion” is linked to price discounts granted on specific quantities of produce with a view to increasing sales. I also note that the term is not used interchangeably with e.g. “marketing” in certain national UTP regimes (e.g. UK Groceries Supply Code of Practice²).

(10) Buyer’s legal right of defence

Under Art. 5(3) of the Directive, Member States shall ensure that, where the complainant so requests, the enforcement authority shall take the necessary measures for the appropriate protection of the confidentiality of the identity of the complainant or the

² See sections 6 and 13 of the Code:

http://webarchive.nationalarchives.gov.uk/20111108222700/http://www.competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf

members or suppliers referred to in Art. 5(2). An authority can consequently decide not to take a decision finding a violation of the UTP rules if such a decision would only be possible – due to rights of the defendant – if the identity of the complainant or the members or suppliers referred to in Art. 5(2) is disclosed to the defendant. It is important to note that the Directive does not make requests for confidentiality by complainants subject to some kind of burden of proof that the confidentiality request is legitimate. The flip side of this deference to a complainant’s or members’ or suppliers’ referred to in Art. 5(2) commercial interests in not having their identity disclosed is that a case may not be decided upon, given the limitations that derive from the rights of the defendant to sufficiently know about the allegations and the evidence presented. In certain cases, these rights will not be able to be respected *without* disclosure concerning the identity of the complainant or the members or suppliers referred to in Art. 5(2). In such cases the authority will have to inform the complainant in due time about the impossibility to close the case by an infringement decision even if on substance it would be warranted. The enforcement authority will have to assess the possibility to adopt an infringement decision without disclosing information about the identity of the complainant or the members or suppliers referred to in Art. 5(2) on a case-by-case basis. The overall balance is one where the concerns about business retaliation of the complainant or the members or suppliers referred to in Art. 5(2) are given important weight. This is in line with general considerations concerning the effectiveness of enforcement as reflected in the Commission’s impact assessment: commercial retaliation or the disruption of business relations may not be a price a complainant or the members or suppliers referred to in Art. 5(2) about unfair trading practices will ultimately be willing to pay.³

The present opinion is provided on the basis of the facts as set out in your letter of 8 February 2019 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,

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Rudolf MOEGELE

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³ Commission Staff Working [Document](#) – Impact Assessment, SWD/2018/93 final