



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

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

Brussels, [Art 4.1 (b)
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BY EMAIL ONLY

[Art 4.1 (b) - privacy]

Thank you very much for your questions of 30 October on the implementation of the Directive (EU) 2019/633 on unfair trading practices ('the Directive').

Question 1

By your first question, you inquire whether the Directive affects the ability of the parties to use Supply Chain Financing. You give the example of payment by the supplier of a small interest in order to receive earlier payment than the payment period stipulated in his invoice (in your example 90 days). In the example you give, a supplier pays an additional amount of 0.25% of the invoice amount to the financing institute to receive earlier payment.

It is important to underline that while the possibility to use Supply chain financing is as such not affected by the Directive, the use of such financing mechanisms cannot prolong the payment periods stipulated in the Directive. The unfair trading practices listed in Article 3 (1) of the Directive are not open to any alternative arrangements between the parties.

This means that even if the supplier was willing to agree to a longer payment period than 30 days after invoice or delivery for perishable and 60 days for non-perishable products, the buyer would commit an unfair trading practice by paying later than the stipulated deadlines in the Directive. However, it seems arguable that parties may want to cater for earlier payments than 30, respectively 60 days, even if this means that the supplier agrees to an arrangement by paying an interest payment, in turn for such earlier payment. Therefore an agreement between the contracting parties of such an earlier payment to the supplier will not fall under Article 3 (1) (d) of the Directive. One could consider that the supplier gets something in return for paying this additional amount, namely to have earlier payment via the bank.

Just for the sake of completeness it should be pointed out that Member States can stipulate shorter payment deadlines in line with Article 9 of the Directive.

[Art 4.1 (b) - privacy]

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Question 2

In your second question, you are asking for clarification on the term used in Article 3 paragraph 1 ¹(a) indent (i) (ii) as well as recital 17 of the Directive for the delivery of products ‘on a regular basis’.

For certain agricultural and food products, delivery normally occurs on a daily basis or several times during a week or a month. The notion ‘*on a regular basis*’ is meant to cover these situations and is e.g. relevant for the dairy sector, in which the sales of raw milk is often made on a daily basis. The rationale of this provision is to avoid e.g. daily invoicing which would result in administrative burden for the parties. Other intervals (e.g. fortnightly deliveries) are also possible, provided that the period for grouping deliveries together for payment purposes does not exceed one month.

Consequently, when deliveries are grouped together for a period not longer than one month, the payment must take place 30 or 60 days after this month, as laid down in Article 3 (1) a of the Directive.

Question 3

In your third question you are seeking for clarification on how the term ‘established’ is interpreted when it comes to filing a complaint with an enforcement authority in a situation in which the buyer is a subsidiary which belongs to a group company.

In order to define ‘established’ for the needs of Article 5(1) of the Directive it is irrelevant whether the identified contract partner is part of a larger group or whether it is the mother company or a subsidiary. If a subsidiary of a multinational company buys agricultural and food products, then the subsidiary, which is the buyer, *in concreto*, is the relevant contract partner, whose place of establishment determines the competence of the enforcement authority referred to in your question. In the competent situation where both the supplier and buyer are established in Denmark, the enforcement authority would be the Danish.

Question 4

By your fourth question you are asking whether the supplier and the buyer of agricultural and food products can agree with binding effect on the choice of applicable law in relation to national legislation including the legislation which transposes the UTP, e.g. whether a supplier in Sweden and a buyer in Denmark can decide on Swedish law.

Under Regulation (EC) No. 593/2008 (Rome I), Parties are free to decide the law applicable in their contractual relationship. The Directive does not interfere with the choice of law applicable to the contract.

However, according to Article 3 (4) of the Directive, the overriding mandatory provisions of the Directive cannot be derogated from. See also Rome I, Article 9. The Member States must therefore ensure in their national legal order that, regardless of the

¹ You refer to Article 3 paragraph 2 of the Directive, but the relevant provision is Article 3 (1) of the Directive.

choice of law otherwise applying to the contract, the parties are not able to derogate from the overriding mandatory provisions contained in Article 3(1) and (2) of the Directive.

Question 5

You inquire which party is under the obligation to provide information regarding whether the supplier and buyer fall within or outside the relevant thresholds in Article 1 of the Directive. You inquire whether both parties should provide information on what their respective turnover is before entering into a delivery agreement or whether it is for the buyer to decide if he is sufficiently reassured by the information supplied by the supplier.

The existence of unfair trading practices by a buyer will be analysed and decided upon by the enforcement authority designated by the Member State. In order to come to a finding of the existence of an unfair trading practice within the meaning of Article 3 of the Directive, according to normal principles of administrative law, the authority would have to establish that the conditions of the applying the articles of the Directive are fulfilled.

The Directive does not establish any burden of proof rule and leaves the stipulation of burden of proof to national legislation (see recital 24 of the Directive).

Question 6

By your sixth question you are asking who has the burden of proof that acts of commercial retaliation of the buyer according to Article 3 (1) (h) of the Directive are due to the supplier's complaint (or exercise of his contractual rights).

As reflected in paragraph 24 of the Recital, the Directive does not harmonise the rules on the burden of proof to be applied in national proceedings, e.g. proceedings before the National Competition Authorities. The rules on the burden of proof are those laid down by the national law of the Member States. Often it will be the party bringing a claim that has to prove its allegation.

Question 7

By your seventh question, you are requesting guidance on how to approach the definition of a 'perishable product'. You want to know whether the purpose of the intended usage (e.g. selling apples for the production of apple puree) of the product should be taken into account when assessing whether a product is unfit for sale.

According to Article 2 (5) and recital 17 of the Directive, a product should be considered perishable if it can be expected to become unfit for sale within 30 days from the last act of harvesting, production or processing by the supplier. This is regardless of whether the product is further processed after sale, and regardless of whether the product is handled after sale in accordance with other rules, in particular food safety rules. This means that the product should be regarded as such, regardless of the individual use which the buyer envisages for the product. Taking into account the purpose of the intended and individual usage of the product by the buyer will undermine the protection that the Directive attempts to give by setting stricter deadlines for payment of perishable products.

If a product is, by its very nature, unfit for sale after the period of 30 days after harvest, production or processing, then it will be considered perishable regardless of the individual use, which the buyer envisages for the product.

Question 8

By your last question, you are in essence asking how to calculate the turnover, if the buyer is member of a buying group.

According to Article 2 of the Directive, the notion of buyer includes any natural or legal person buying agricultural and food products, including groups. This means that in situation where the buyer is the contract partner of the supplier, buying such products of him, the Directive will apply.

The Directive does not contain provisions related to the revenue, but refers to the *turnover* of the company. 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 taxes².

In Article 1 (2), the Directive refers to the SME Recommendation for turnover purposes and in particular to Articles 3, 4 and 6 thereof. This means that in order to calculate the turnover, the Directive would take into account whether a supplier or buyer qualifies as autonomous or whether the supplier or buyer has a relationship with other enterprises, which would qualify as partner or linked enterprises.

In these latter situations, the rules of Article 6 of the Annex to the SME Recommendation describe in detail, how the turnover should be calculated, for instance, in case of partner or linked enterprises and where they exist, the consolidated accounts of the enterprise (in which the enterprise is included), rather than the countrywide turnover, would have to be taken into account. As Annex of the SME Recommendation describes and as illustrated by various examples in the user guide (see the examples as of page 25), shares of other enterprises in the supplier/buyer or shareholdings of the supplier/buyer in other enterprises are thus relevant for turnover calculations (partner enterprises) as well as the exercise of control which a supplier/buyer has in other enterprises or is subjected to (linked enterprises).

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.

The present opinion is provided on the basis of the facts as set out in your email of 30 October 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

² 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).

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