EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

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

Brussels,
AGRI.DDG3/[Art 4.1 (b)] Ares (2019) 3510082

BY EMAIL ONLY

Subject: Your letter of 3 May 2019 concerning the implementation of the UTP Directive

[Art 4.1 (b) - privacy]

Thank you for the above-referenced letter, in which you raise several questions regarding the interpretation of provisions in Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ("the Directive").

(1) Confidentiality of the complaint

In your letter your refer to Article 5 (3) and Article 6 (1) (d), (e) and 6 (2) of the Directive and ask whether the right of a complainant to seek confidentiality is absolute or subject to qualifications, in particular as expressed in Article 6 of the Directive.

Acknowledging the "fear factor" is an important element of the Directive. As smaller suppliers often fear retaliation of larger buyers when bringing a complaint to the enforcement authority, the Directive provides in several places for the protection of the identity of the complainant and other confidential information. According to Article 5 (3) of the Directive, Member States indeed have an obligation to take appropriate measures to ensure such protection. Article 6 (1)(d) of the Directive further underlines the importance of the protection of confidentiality by giving the enforcement authority the possibility to abstain from the adoption of a decision should this not be possible without

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revealing the identity of the complainant or other confidential information, as identified by the complainant.

However, according to Article 6 (2) the Member States are also obliged to ensure that the enforcement authority, when exercising its power, respects the rights of defence as laid down in the Union law and the Charter of Fundamental Rights[1], see Article 48 of the Charter.

Taken these provisions together, the enforcement authority may have to strike in individual cases a balance between the right of the supplier for confidentiality and the right of defense of the buyer, whereby concerns about commercial retaliation are given important weight.

This means that the Member State should strive to protect the identity and other confidential information of the complainant. However, there may be situations in which such protection is not possible without curtailing the right of defence of the buyer. In such situations, respect of the right of defence would carry the day if the authority decided to issue a decision.

(2) Scope of the duties of the enforcement authorities

You raise the question to which extent the authority is obliged to not only react to complaints, but also act ex officio.

Article 6 of the Directive requires Member States to empower the enforcement authority with both the power to act upon a complaint and to act ex officio. This empowerment is to be distinguished from the action which the enforcement authority will take in an individual case and it does not create an obligation on the authority to launch an ex officio investigation, see in this regard recital 33. Neither does the Directive oblige Member States to entrust the authority with the task of 'general monitoring' of UTPs, e.g. by constant scrutiny of the contractual relationships in the agricultural and food supply chain for possible infringements.

However, in conjunction with Article 6 (1) of the Directive, Member States are obliged to have the necessary resources to be able to conduct ex officio investigations. In this regard, one should remember that the power of an enforcement authority to act ex officio can be important in pursuing allegations of infringements by buyers in situations in which suppliers are too afraid to file a complaint.

(3) Payment later than 30 calendar days from invoice or delivery

You point out that the UTPs prohibited in Article 3 also apply to farmers and cooperatives of which they are members when the farmers sell as suppliers an agricultural and food product to the cooperative. In this context you wonder whether Article 3 (1) (a) (i) of the Directive is compatible with delivery obligations of 5 weeks as they exist in your Member State for deliveries to cooperatives.

Your understanding that also cooperatives can be subject to the prohibitions in Article 3, if they buy an agricultural and food product from a supplier, is correct.

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[1] OJ C 326/191 of 26.10.2012.

However, Article 3 (1)(a)(i) of the Directive does not impose any restrictions as regards the delivery periods which suppliers and buyers can agree upon. Article 3 (1)(a)(i) only puts a restriction on the length of the payment period. In order to avoid daily invoices in situations of regular deliveries, the Directive allows for grouping several deliveries together, but with a maximum limit of one month, the end of which triggers the 30 days period. This means that in a situation of the five weeks delivery periods, the 30 days would nonetheless start after the end of a month, also for the deliveries made in the fifth week.

(4) Interface between the Alternative Dispute Mechanism and mandatory investigations

You ask clarification on the interaction on the duty under Article 5 (6) of the Directive to conduct an investigation and the promotion of the alternative dispute mechanism in Article 7.

In this regard it is important to underline that while Article 5 deals with the action of the enforcement authority for dealing with an individual complaint, Article 7 gives Member States a possibility to promote alternative dispute resolution mechanisms in its territory. In this regard, the Directive does not prescribe Member States by which means and to which extent Alternative Dispute Mechanism ("ADR") should be promoted.

As to the relation between these two provisions, Article 7 clarifies that the promotion of ADR is without prejudice to the right of the complainant to file a complaint and the powers of the enforcement authorities in Article 6. By this formulation, the Directive rules out that the existence of ADR in a Member State can legally prevent a complainant from filing directly a complaint with the authority: e.g. the complainant cannot be obliged to first (unsuccessfully) launch ADR before being able to file a complaint.

Likewise, the enforcement authority cannot be obliged to stop an ongoing investigation, just because the parties have decided to launch alternative dispute resolution. Indeed, as you point out, according to Article 5 (6) of the Directive the enforcement authority is obliged to initiate, conduct and conclude an investigation within a reasonable period of time, where sufficient grounds exist. Such sufficient grounds can result from a substantive analysis of the complaint, but as explained in recital 28, the finding of *insufficient* grounds of acting upon a complaint can also result from administrative priorities. It is for the enforcement authority to decide whether considering administrative priorities, such as e.g. caseload, would justify in casu the non-prioritisation of an investigation following a complaint, where the parties are using means of alternative dispute resolution.

(5) Clarification on Allocation of Burden of Proof

You inquire whether the allocation of burden of proof will be a matter of national law.

The Directive does not contain any burden of proof rule and recital 24 of the Directive explicitly states that a harmonisation of the burden of proof rule is not subject of the Directive. This means that Member States, while respecting the obligations of Union law and the principle referred to in Article 6 (2) of the Directive, can apply their burden of proof rules.

(6) Can fines be imposed by the Courts?

Your question is whether Article 6 (1) e) of the Directive ("initiate proceedings") is to be understood in giving Member States *a choice* to either entrust an enforcement authority with the power to impose fines and penalties or only with the power to seek fines and penalties from another body, such as a court, by initiating the respective proceedings.

Article 6 of the Directive requires Member States to empower enforcement authorities with the power to levy fines and other penalties. However, while this empowerment must cover both fines and penalties, the Directive does not prescribe that these fines and penalties must necessarily be levied by an *administrative* body, as long as the enforcement authority, if it is an administration, is empowered to initiate fines/penalty proceedings before another body, e.g. a court.

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The present opinion is provided on the basis of the facts as set out in your letter of 3 May 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 in Member States. Doing so, we will redact any personal information.

Yours sincerely,

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Rudolf MOEGELE

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