Abstract: Unfair trading practices between economic operators are a consequence of the concentration and vertical integration of retailers of fast-moving consumer goods. The strengthened market position of the latter allowed them to impose unfavorable conditions on their economically weaker partners in the supply chain – such as manufacturers and small suppliers. The cross-border nature of trade in agricultural goods and foods has brought this issue to the attention of the European institutions relatively quickly.


1. INTRODUCTION

The issue of unfair trading practices between suppliers and buyers in the fast-moving consumer goods chain has emerged relatively recently as a consequence of the concentration and vertical integration of retailers of such goods.

The strengthened market position of customers has enabled them to impose favorable trading conditions on their weaker partners in the chain – manufacturers and small suppliers, these conditions being unfavorable for the latter. They included both unfair contract terms and margin squeeze on suppliers so that the low prices they offered to the consumers were at the expense of the low purchase prices imposed on their suppliers. Those unfair practices are not covered by the EU antitrust law – neither by norms regulating vertical restraints nor by the norms regarding the abuse of dominant position. But those practices affected negatively a lot of small and medium producers and distributors in the EU. The cross-border nature of trade in agricultural goods and food brought this issue to the attention of the European institutions, as the market concentration and the vertical integration of fast-moving consumer goods retailers being a global tendency. The problem of unfair trade practices of retailers found a place in the public discussions held within the EU framework. The debate took place both at the European and national levels, National debates led to the adoption of various regulatory solutions by the Member States which manifested differences in their approaches to the problem of unfair trade practices.
practices. Their regulation was carried out either on the basis of norms of general civil and commercial law or based on specific sectoral rules, within the framework of competition law, codes of loyalty, etc. The variety of approaches led to the necessity of a certain level of harmonization of these norms in the EU due to the cross-border scope of the chain. Harmonized rules can prevent the undesirable situation in which these unfair trade practices are allowed to exist in some parts of the chain, while not in others. Besides that, harmonized rules can hinder the efforts of buyers to choose favorable (for themselves) jurisdiction with less protection for their suppliers.

In 2018, the Commission initiated a proposal for a draft Directive on unfair commercial practices between food business operators. As a result of the legislative process, Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain was adopted and published in the Official Journal of the EU on 5 April 2016.

The Directive was adopted based on Art. 43 of the TFEU, where paragraph 2 states that the European Parliament and the Council, in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, should establish the common organization of agricultural markets and adopt the provisions necessary to achieve the objectives of the common agricultural policy.

Member States were required to inform the Commission on the adopted laws, regulations and administrative provisions intended to comply with the Directive. By 31 July 2021, 15 countries had notified the Commission that the Directive had been fully transposed, 11 did not notify the Commission, and France had notified that it had partially transposed it. As a result, the Commission has initiated infringement proceedings against the twelve Member States that have not notified the full transposition of the Directive.

2. OBJECTIVES AND APPROACH OF THE DIRECTIVE

The Directive aims to protect the smaller enterprises of the supplier/seller/producer from the larger enterprises of the buyers in the agricultural and food supply chain. This chain can be described as a sequence of vertically interconnected markets. Therefore, a seller can be the manufacturer, the processor, the distributor, etc. Accordingly, a buyer can be a processor, a distributor, a retailer, etc. In other words, the Directive covers all sales/supply contracts throughout the production and marketing chain of food and agricultural products, except for the sale to consumers (which is covered by the consumer law norms, respectively on EU level by the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market).

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5 Petev, B., Ikonomicheskata sigurnost, faktor za natsionalna sigurnost, sp. Biznes posoki, br.1 /2021, BSU, Burgas, 2021, str. 69-73, ISSN 1312 – 6016 (Print), ISSN 2367 – 9247 (Online), pp. 71
7 OJ L 111, 25.4.2019, pp. 59 – 72
8 These member states are Austria, Belgium, Cyprus, the Czech Republic, Estonia, France, Italy, Poland, Portugal, Romania, Spain and Sweden
As mentioned above, different rules exist in the Member States, providing for different hypotheses and different intensities of protection against unfair commercial practices. Therefore, the Directive provides the minimum harmonization approach, as set out in recital 1, which is to indicate two shortlists of unfair commercial practices (so-called black and gray lists), which the Member States must ban. Separately, the minimum harmonization approach enables Member States to adopt additional national rules prohibiting unfair commercial practices not covered by Directive 2009/633 as well as to maintain the existing stricter rules.

Secondly, the Directive obliges states to provide an administrative procedure for lodging complaints, including to ensure their confidentiality, before the relevant public authority. The aim is to build administrative capacity to deal with problems, and confidential complaints aim to safeguard the applicants’ interests and limit obstacles to the exercise of their rights. The “fear” factor, which discourages affected companies from seeking their rights for fear of retaliation, is deemed as one of the main reasons for the lack of transparency in the chain’s trading conditions and practices, which makes it difficult to detect and investigate unfair commercial practices.

Thirdly, the Directive establishes a mechanism for assessing the achievements of Member States, by periodically updating and reviewing the achievements in this sphere. This is particularly important insofar as the regulation must be sensitive to possible changes in the relationship between enterprises – these changes represent new trade practices that shall be also a subject of further evaluation. This assessment is also important considering the fact that at present the effects of unfair commercial practices are still insufficiently studied, which requires the collection of additional information on their effects as well as on the effects of the norms adopted.

### 3. FIELD OF APPLICATION

#### 3.1. Sectoral Application

The Directive provides for the creation of norms in a certain sector, the trade in agricultural products and foodstuffs, as set out in Annex I to the TFEU, and the goods resulting from the processing of agricultural products into foodstuffs. The advantage of such an approach is that by establishing and applying rules for a specific sector, the specifics of this type of relationship can be taken into account as the chain of production and sale of agricultural products is different from that of production and sale of other goods, vehicles for example. On the other hand, this implies the application of various sectoral rules for cases where the similarities outweigh the differences, such as the trade in non-food fast-moving goods – non-food suppliers generally suffer from similar unfair practices. Insofar only Latvia has declared that it has extended the protection standard of the Directive to the non-food sector.

On the contrary, while transposing the Directive, Bulgaria has limited its existing horizontal protection, repealing the existing horizontal norm of Art. 37 a of the Competition Protection Act, which provides a general prohibition of the abuse with superior bargaining position, and replaced it with the sectoral provisions of Art. 37 b-e for agricultural and food products. Thus, strengthening the sectoral rules was adopted at the expense of cancellation of the horizontal protection under art. 37a of the Law on Protection of Competition.

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3.2. Application to Certain Agreements According to the Annual Turnover of the Counterparties

Another important issue is determining to which agreements the prohibitions of the directive shall apply to. In this respect, it uses a formalistic (heuristic) approach to assessing the stronger position of the buyer, which is reduced to the simplest arithmetic comparison between the annual turnover of the supplier and that of the buyer.

Thus, a supplier with an annual turnover of less than EUR 2 million shall be protected from the described unfair commercial practices imposed on it by all buyers with an annual turnover of more than EUR 2 million (Article 1, paragraph 2, item a). A supplier with an annual turnover of between EUR 2 and 10 million is protected from all buyers with an annual turnover of over EUR 10 million. A supplier with an annual turnover between EUR 10 and 50 million is protected by all buyers with an annual turnover over EUR 50 million, etc.

The Directive prefers the heuristic approach to a “higher turnover” instead of other approaches of assessment used in various legislations such as “market power”, “abuse of market power” or “abuse of a stronger bargaining power”\(^\text{11}\). Although these criteria allow a more accurate assessment of inequality, they cause market participants a greater uncertainty of whether they comply with the prohibiting norms or not.

Accordingly, the supervising authority does not also need to assess the characteristics of the structure of the specific market, of the specific legal relationship between the undertakings concerned. This approach is not adopted here – it concerns cases in which a company with a higher turnover manages to impose its conditions on companies with a lower turnover, without requiring the buyer to be in a stronger position when negotiating.

The disadvantage of this approach is that it assesses the formal rather than the proven inequality between the counterparties, supporting the weaker counterparty.

Its advantages are in the direction of facilitated proving and facilitated compliance with the rules by enterprises.

In the first place, this approach leads to transparency in the application of the law, insofar as the assessment of the undertaking’s conduct can be easily carried out by the administrative sanctioning body.

Also, the specific thresholds make it easier for companies to comply with the rules, as far as they provide them with a stereotypical and therefore easily applicable approach to assessing what provisions they can include in their contracts. The buyer can assess its own position based on a clear indicator, such as the annual turnover. Similarly, it can assess the situation of its partner based on public information concerning the partner’s annual turnover.

\(^{11}\) Thus, for example, the prohibition in the directive would apply to contracts between a buyer with an annual turnover of EUR 2 000 001 and a supplier with an annual turnover of EUR 1 999 999. In the event that the criteria was that of the market power, the buyer’s market share would also be relevant. In the event that the criteria was that of the stronger bargaining position, a tie in turnover would rather indicate that there is no stronger bargaining position or, if such a stronger bargaining position exists, it shall be measured by different set of criteria.
The transposition of this provision has led to the greatest diversity in the legislative approaches of the Member States. Five countries have adopted the thresholds set out in the Directive. The rest in one way or another had extended the scope of their national legislation. Examples of diversity of the approaches are – the reduction of the initial threshold for the implementation of the directive, the lack of a requirement for a certain threshold of the seller, etc.

4. TYPES OF PROHIBITED BEHAVIOR – “BLACK” AND “GRAY” CLAUSES

The Directive uses the approach of listing prohibited behavior in the form of the so-called “Black clauses” – i.e. those that are strictly prohibited and “gray clauses” – that can be applied by the parties if they have concluded an explicit agreement in writing. The Directive specifies 16 hypothesizes of unfair commercial practices, divided into a “black” list of 10 absolutely prohibited commercial practices and (Article 3, paragraph 1 of the Directive) and a “gray” list of 6 illegal practices. commercial practices the prohibition of which can be overcome by unambiguous agreement between the parties (Article 1, paragraph 2 of the Directive).

This will likely require the updating of lists over time, as a result of companies’ efforts to create clauses that are not covered by the blacklist but achieve comparable adverse effects. Thus, the application of this approach has the potential to commence a competition for legal ingenuity between the legal advisers of companies with opportunities and the legislator, based on the letter of the norm rather than on its sense. Therefore, this approach is appropriate given the envisaged legislative technique (a directive to be transposed into the legislation of the Member States), but is unsuccessful as a legislative decision with the direct application (as a regulation) insofar as it would limit the possibilities for counteracting newly introduced unfair commercial practices.

Except for the first and second prohibitions, where States may adopt shorter time limits, the other prohibitions should be applied by the Member States in that manner. However, the principle of minimum harmonization makes it possible both to introduce additional prohibitions (both absolute and conditional) and to define a conditional prohibition as absolute. As a result, some countries have supplemented the “black list” and the “gray list” with additional absolutely prohibited, respectively conditionally prohibited practices, while others have added the practices from the gray list to their absolutely prohibited list.

4.1. Black Clauses

“Black clauses” are those provisions, that set absolute prohibition of the described behavior in the way that the parties of the agreement are not entitled to derogate this ban in any event.

The first and second prohibitions concern deferred payment. The directive prohibits deferred payment by a buyer to a supplier for perishable agricultural and food products – later than 30 days from the agreed delivery date, and for other products – later than 60 days after the expiry of the agreed delivery date, respectively, the date, after which the amount payable was set.

Similarly, if the delivery contract does not provide for deadlines for this delivery, the 30/60-day period starts and runs from the delivery date.

12 Bulgaria, Greece, Croatia, France, Hungary, Lithuania and Slovakia.
13 Bulgaria, Croatia, Latvia and Slovakia.
14 Denmark, Ireland, Luxembourg, Malta and Netherlands.
Most Member States – 11 of them, have adopted the exact Directive deadlines. Bulgaria and Sweden have adopted a higher standard – 30 days for both durable and perishable agri-food products, and Hungary and Slovakia have adopted a deadline of 15 days for both durable and perishable products.

The third prohibition is that of the short-notice cancelation by the buyer of already ordered perishable agricultural and food products. In the event of such short notice, it cannot be reasonably accepted that the supplier will find another way to market or use these products. The norm includes the presumption that a notice of less than 30 days is always considered such short notice, unless states, in duly justified cases, provide for shorter deadlines in their legislation.

The fourth norm represents prohibition on unilateral changes of the contract for the supply of agricultural and food products. In that regard, the Directive introduces a higher standard of protection in so far as it does not allow a unilateral modification of the supply contract in those cases, even if such a possibility is provided for in the contract.

The fifth “black” clause is the prohibition of the practice of requiring payments from the supplier that are not related to the sale of agricultural and food products of the supplier. Such payments were very popular in Bulgaria concerning the imposition of payment obligations by suppliers for all kinds of activities of the buyer, which became known as “Happy Birthday fee”, “new store opening fee”, etc.

The sixth provision prohibits any kind of request from a buyer for payment for the deterioration or loss, or both, of agricultural and food products that occurs on the buyer’s premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier.

The seventh prohibition is with regard to the refusal of the buyer to confirm in writing the terms of the supply contract between the buyer and the supplier, for which the supplier has requested for written confirmation.

The eighth “blacklisted” prohibition is the unlawful acquisition, use or disclosure by the buyer of trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and the Council.

The ninth absolute prohibition is a threat by the buyer to carry out or carrying out acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation.

The tenth prohibited practice is a request from the buyer to the supplier for compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier’s products despite the absence of negligence or fault on the part of the supplier.

4.2. Gray Clauses

“Gray clauses” oblige the Member States to introduce a relative ban on certain commercial practices. The prohibition may be derogated by the parties in the event where it is agreed in
advance with clear and unambiguous terms in the supply contract or in a subsequent agreement between the supplier and the buyer. While the written form is not a requirement for the supply agreement, in this event it is necessary in order to fulfill the requirement of the Directive.

Generally, the Directive defines as gray clauses the practices of transfer of part or all of the risks or costs of selling the goods from the buyer to the supplier. The redistribution of these risks/costs has a different hypothesis, which the Directive has described in Art. 3 (2), as follows:

In the first place, it is the practice according to which the buyer may return some unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both. The return by the buyer of unsold goods is a phenomenon of the so-called “reverse logistics”, which includes the movement of goods (damaged, recyclable, etc.) from the customer to the supplier, i.e. back to the movement of the chain from the manufacturer to the customer. In this case, the return of the unsold goods by the buyer shifts their sale not to the buyer (who should have decided how much goods to buy and how to sell them), but to the manufacturer or distributor. Exempting the buyer from this risk demotivates him to assess the quantities he needs and deprives him of incentives to sell the goods, insofar as the loss will be borne by the buyer. Conversely, the supplier will incur a loss from the returned unsold production, which could be impossible to sell through alternative channels. Additionally, this leads to overproduction, which, when it cannot be realized, turns into waste.

The second “grey prohibition” includes charging the suppliers as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market. Through this practice (entrance fee, fee for some additional item) a condition for access of the goods of the supplier to the shelves of the buyer is the payment of a certain fee, which is to bear part of the costs of the buyer for the sale of goods.

The third provision prohibits the request from the buyer to bear all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion. This practice, in the form of, for example, a “promotion fee”, transfers to the supplier the burdens associated with the buyer’s marketing policy.

The fourth prohibition concerns a request from the buyer to the supplier to pay for the advertising by the buyer of agricultural and food products. This practice is widespread, in the form of various advertising fees for marketing the supplier’s products (e.g. through brochures, commercials, posters, etc. that directly advertise the product), which aim to market the products to the buyer’s benefit. Through these fees, the supplier shares part of the costs of the buyer for the marketing of goods to the end user.

The fifth prohibition concerns a request from the buyer to the supplier to pay for the marketing by the buyer of agricultural and food products. This is a fee for carrying out various marketing activities of the supplier’s products, at his expense and, ultimately, in the interest of the buyer.

The sixth prohibited practice is that of charging the supplier by the buyer for the staff engaged in the fitting-out the premises used for the sale of the supplier’s products. Besides by paying for the equipment, the supplier bears the costs of storing and offering the products that the buyer sells.
5. TRANSPOSITION OF THE DIRECTIVE

Member-states had to transpose the Directive into their legislation by 01.05.2021, and the measures should have entered into force six months later, i.e. to 01.11.2021.

As required by the Directive, Art. 6, para. 1, Member States must designate a body which, inter alia, may initiate and conduct investigations, on alert or ex officio, carry out inspections, decide on interim measures or the cessation of certain practices, decisions imposing sanctions, as well as to ensure the publicity of these decisions.

Generally, there are several possible alternatives for the appointment of such a body – a body of the judiciary (court), a body responsible for food issues, a ministry (agriculture, economy), a consumer body, or a competition authority.

Carrying out the activity before a body of the judiciary means the adoption of specific rules within the framework of civil or commercial contract law could be justified by the fact that these are rules governing contractual and pre-contractual relations. In case of violation of these norms, the affected party may file a claim for damages before the civil court.

However, this protection is insufficient for the following reasons:

In the first place, the undertaking concerned will have to pay serious legal costs, which it often cannot afford, as the applicant is most often a small or medium-sized undertaking with limited legal resources, especially compared to those of the stronger undertaking. As a result, there is a strong likelihood that the lawsuit will be unprofitable for the plaintiff and that he will ultimately fail to prove his claim.

Secondly, the initiation of a civil or commercial case may lead to retaliation against the undertaking concerned. This circumstance demotivates smaller traders to take such action.

The Directive also finds such a solution to be insufficient. The enterprise concerned needs assistance to exercise its rights, which the court does not offer through its competitive civil or commercial proceedings. The provision of administrative proceedings against infringers increases the guarantees for the enterprise concerned. In these proceedings, confidential complaints may also be allowed to be considered in order to overcome the applicant’s fears of retaliation by the infringer\(^\text{15}\). Involving the state’s administrative capacity to establish unfair practices also makes it easier to prove the latter. The administrative penalty, in addition to the compensation, also acts as a preventive measure against potential violators. It is for this reason that the sixteen Member States which have notified the Commission also provide for the power to investigate and impose sanctions to be exercised by administrative authorities.

\(^{15}\) Article 5 (3) of the Directive provides that, at the request of the applicant, the enforcement authority shall ensure the confidentiality of its identity and of any other information the disclosure of which, in the applicant’s view, would prejudice his interests. Although this is a positive legislative development, this guarantee can only remain a good wish, insofar as in disclosing the facts in the proceedings; this confidentiality is practically impossible to maintain, as far as the factual situation will have to be presented to the company concerned (otherwise the exercise of its right of defense will be impossible), which is alleged to be in breach and it will easily be able to identify its trading partner.
Six countries have assigned to their competition authority to investigate and impose sanctions. It is generally considered to be the most appropriate, given that it has such competences, these bodies possess the necessary means and expertise which enable them to carry out the relevant checks on the basis of which to establish the facts and reach the relevant decision. A problem in granting these powers to the national competition authority may be the requirement of Directive 2019/1 of 11 December 2018, according to which national competition authorities should give priority to infringements of competition law than to their other competences.

The other alternative is for competent authority to be the relevant public authority of a Member State responsible for food safety, agriculture or specific authority that regulates unfair commercial practices. Eight countries have adopted this approach, which includes the Ministry of Agriculture, the department responsible for food markets or the department responsible for unfair competition or unfair practices, the department for consumer protection and others.

6. CONCLUSION

Unfair commercial practices between traders are a relatively new phenomenon and its economic effects on the diverse interests of market participants (large enterprises, small and medium-sized enterprises and consumers) are still insufficiently explored.

This makes it difficult to establish a stable legal solution to the issue, as there is no complete clarity about the overall set of problems that unfair commercial practices give rise to. For this reason, the prohibited practices under the Directive are similar to abuse of dominant position cases (with the difference that the buyer that is not in dominant position\textsuperscript{16}).

However, there are obviously unfair consequences of these practices called for a legal intervention at an early stage in the study of the effects of unfair commercial practices.

In this respect, the Directive sets the beginning of a process, the rules and authorizations of which will probably be the subject of further discussion and the corresponding changes. This was the reason which has motivated some Member States to supplement the minimum standards of the Directive with additional absolutely or conditionally prohibited unfair acts. For this reason, it is provided that the first evaluation of the Directive will be carried out by the Commission by 01.11.2025, while if necessary it can be done earlier.

REFERENCES


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