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German-Ukrainian  
Agricultural Policy Dialogue

Commentary on the legislation

APD/KG/04/2022

**Briefing note on the draft “Law of Ukraine on making changes to some legislative acts regarding the regulation of certain issues in the field of food trade” in the context of EU integration and in particular in light of the “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<sup>1</sup>”**

Richard Moody

Kyiv, October 2022

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0633&from=en>

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## **About the Project “German-Ukrainian Agricultural Policy Dialogue” (APD)**

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The project “German-Ukrainian Agricultural Policy Dialogue (APD)” has been implemented with the support of the Federal Ministry of Food and Agriculture (BMEL) since 2006 and is planned to run until 2024. While the implementing agency of BMEL’s entire bilateral cooperation-program is GFA Consulting Group LLC, the APD-project in Ukraine is implemented by a consortium consisting of IAK Agrar Consulting, Leibniz Institute of Agricultural Development in Transition Economies (IAMO) and AFC Consultants International. The recipient of the project is the National Association of Agricultural Advisory Services of Ukraine “Dorada”. The beneficiary of the project is the Ministry of Agrarian Policy and Food of Ukraine. The project aims at supporting Ukraine in the areas of sustainable agriculture, efficient processing industry and international competitiveness in accordance with the principles of market and regulatory policies, taking into account the potential for development resulting from the Association Agreement between the EU and Ukraine. To meet this goal, the Project provides information on German, in particular Eastern German, experience and know-how, as well as on international European experience with regard to the development of an agrarian and forestry policy.

One of the components of APD – the land component – is managed by BVVG German AgriForest Privatisation Agency, a state-owned enterprise that is responsible for the administration of state-owned agricultural and forestry land in (Eastern) Germany. Under the land component, the project offers an exchange of experience and know-how between Ukrainian and German land management experts from BVVG and additional German land management institutions. The land component focuses on political, legal and technical issues related to land management and accompanies the current discussions in Ukraine concerning land market development.



[www.apd-ukraine.de](http://www.apd-ukraine.de)

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### **Disclaimer**

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## **1. THE SCOPE OF THIS BRIEFING NOTE**

This analysis relates to the “Memorandum between public organizations and business representatives on mutual understanding and joint work in the field of food trade” and the draft “Law of Ukraine on making changes to some legislative acts regarding the regulation of certain issues in the field of food trade”.

The analysis will focus on the extent to which the objectives and provisions of the draft legislation are in line with those of the relevant EU legislation. In this context it is important to note the following:

The Association agreement provides a general obligation for approximation at article 114 “Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU acquis.” This process is specified in chapters related to areas of cooperation including e.g. technical barriers to trade, sanitary and phytosanitary and trade in services.

- This is a gradual process which should be fully completed by the date of accession if not specified otherwise in the Association Agreement and its protocols or by bi-lateral consensus.

The regulatory instrument used by the EU in this case is a Directive which is a legislative act that sets out a goal that all EU countries must achieve and the deadlines by which to do so. However, it is up to the individual countries to devise their own laws on how to reach these goals. The Directive also imposes the minimum level of protection and explicitly allows MS to impose a higher level of protection.

- This means that even EU Member States (EUMS) are given freedom to regulate in accordance with national regulatory and institutional systems as long as the legislative objectives are met. In reality because the objectives are specified through prescriptive and quantitative provisions, many EU member states have stayed quite close to the formulations of the Directive but in some cases have imposed additional and more stringent requirements.

As Ukraine is not currently an EU member state and therefore is not bound by the legislative deadlines imposed on the EUMS, Ukrainian lawmakers and stakeholders can prioritise and schedule legislative activity to address the issues faced by Ukrainian agri-food businesses within the constraints of the specific obligations assumed bilaterally.

When trading with the EU however, Ukrainian businesses are of course subject to the provisions of the EU and EU member state legislation both in terms of the obligations it imposes on exporting countries but also in respect of the right is accords.

## **2. DIRECTIVE (EU) 2019/633**

### **Background and rationale**

As noted in a written contribution from the European Union submitted for Item 4 of the 138th OECD Competition Committee meeting on 22-24 June 2022, the issue of bargaining power of buyers and, in particular, of imbalances in bargaining power between strong buyers and weaker suppliers have been discussed for a long time at EU level specifically as regards the food supply chain.

On 17 April 2019, the European Parliament and the Council adopted such specific

legislation in the form of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ('the Directive'). The Directive is introduced on the agricultural legal basis of the Treaty (Article 43 TFEU) and is not at all linked to competition policy. It aims to afford protection along the entire agricultural and food supply chain by protecting certain suppliers selling agricultural products and products processed from these products for use as food.

The Directive takes into account the negative impact of unfair trading practices for farmers both as direct victims of such practices but also as indirect victims of a possible cascading effect of such practices when they occur further downstream in the food supply chain. Many EU Member States had already certain national rules in place or promoted various forms of self-regulation before the Directive was adopted. The adoption of rules at the EU level introduces a minimum harmonisation and avoids further fragmentation of the legal framework and was based on multiple analysis and policy debates

The Directive provides for the protection of weaker suppliers against stronger buyers, which includes any supplier of agricultural and food products with a turnover of up to €350 million, with differentiated levels of protection provided below that threshold. The protection offered by the Directive depends on the relative size of the companies and relies on a so-called 'step approach' based on turnover figures which serve as a proxy to reflect the difference in bargaining power of suppliers and buyers (Article 1). It aims only at protecting those suppliers which due to their weak bargaining position need such protection. Suppliers with bargaining power above €350 million turnover are not covered. The Directive covers farmers, producer organisations and distributors below the threshold and also applies to suppliers and buyers located outside the EU, provided one of the parties is located within the EU.

The Directive does not prohibit unfair trading practices in general but Article 3 targets sixteen specific practices and distinguishes between ten 'black' and six 'grey' practices. Whereas black unfair trading practices are prohibited by Article 3(1), whatever the circumstances, grey practices are allowed under Article 3(2) if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner.

The Directive is binding on all 27 Member States and provides minimum harmonisation on unfair trading practices in all EU countries. It also lays down minimum rules on the scope of its application and the main definitions as well as on the enforcement of those prohibitions and the coordination between enforcement authorities of the different Member States. Given that it concerns minimum harmonisation, Member States may adopt or maintain national rules that go beyond those in the Directive provided that such national rules are compatible with the rules on the functioning of the internal market. However, Member States cannot offer less protection at national level than what is foreseen by the Directive.

On 27 October 2021, the Commission published an interim report on the state of the transposition and implementation of the Directive by the Member States. A more comprehensive view of the state of transposition will emerge once the remaining Member States submit their notifications. An evaluation of the Directive at EU level is due end of 2025.

EU countries were required to transpose the Directive into national law by 1 May 2021 and apply it six months later.<sup>2</sup> As Ukraine is not yet an EU member, this legislative

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<sup>2</sup> As of 27.07.2021 The Commission opened infringement procedures against 12 Member States for failing to transpose EU rules

deadline does not apply although of course the EU members are able to apply the legislation as soon as it is in force and the Ukrainian food chain actors may make use of the rights it grants from the moment it is in force.

## **Aim and scope of the Directive**

**The aim** of the Directive is to establish a minimum list of prohibited unfair trading practices in relations between buyers and suppliers in the **agricultural and food supply chain** and lays down minimum rules concerning the enforcement of those prohibitions and arrangements for coordination between enforcement authorities.

**Scope of the protection** extends to **all agricultural and food products** as listed in Annex I to the TFEU Annex<sup>3</sup>

The Directive provides for the **protection of weaker suppliers against stronger buyers**, which includes any supplier of agricultural and food products with a turnover of up to €350 million with differentiated levels of protection provided below that threshold. This covers **farmers, producer organisations and distributors** below the threshold. This also **applies to suppliers and buyers located outside the EU**, provided one of the parties is located within the EU.

It uses a **“step approach”** based on turnover figures as a proxy that reflects the different bargaining powers of suppliers and buyers. The step approach protects a supplier from unfair trading practices engaged in by an economically stronger buyer. E.g. a micro farmer with less than € 2 million turnover is protected against buyers with a turnover exceeding € 2 million. Smaller suppliers above € 2 million and not exceeding €10 million are protected against buyers which have a turnover higher than € 10 million. The protective effect covers suppliers having turnovers of up to € 350 million.

## **Banned unfair practices**

To improve the position of both farmers and small and medium sized businesses in the food supply chain, the EU restricted **16 unfair trading practices**.

## **“Black” / “grey” practices**

This Directive distinguishes between 'black' and 'grey' practices:

- **black unfair trading practices are prohibited**, whatever the circumstances,
- **grey practices are allowed if the supplier and the buyer agree on them** beforehand in a clear and unambiguous manner.

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*banning unfair trading practices in the agri-food sector. The [Directive](#) on unfair trading practices in the agricultural and food supply chain, adopted on 17 April 2019, ensures protection of all European farmers, as well as of small and mid-range suppliers, against 16 unfair trading practices from larger buyers in the food supply chain. The Directive covers agricultural and food products traded in the supply chain, banning for the first time at EU level such unfair practices imposed unilaterally by one trading partner on another.*

*The deadline for transposing the Directive into national legislation was 1 May 2021. As of today, Bulgaria, Croatia, Denmark, Finland, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Slovakia, and Sweden have notified to the Commission that they adopted all necessary measures for transposing the Directive, thus declaring the transposition complete. France and Estonia have informed that their legislation transposes only partially the Directive.*

*The Commission sent letters of formal notice to Austria, Belgium, Cyprus, Czechia, Estonia, France, Italy, Poland, Portugal, Romania, Slovenia and Spain requesting them to adopt and notify the relevant measures. The Member States have now two months to reply.*

<sup>3</sup> [https://eur-lex.europa.eu/resource.html?uri=cellar:07cc36e9-56a0-4008-ada4-08d640803855.0005.02/DOC\\_45&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:07cc36e9-56a0-4008-ada4-08d640803855.0005.02/DOC_45&format=PDF)

**Ten black unfair trading practices** – These practices are prohibited in all circumstances

1. Payments later than 30 days for perishable agricultural and food products
2. Payment later than 60 days for other agri-food products
3. Short-notice cancellations of perishable agri-food products
4. Unilateral contract changes by the buyer
5. Payments not related to a specific transaction
6. Risk of loss and deterioration transferred to the supplier
7. Refusal of a written confirmation of a supply agreement by the buyer, despite request from the supplier
8. Misuse of trade secrets by the buyer
9. Commercial retaliation by the buyer
10. Transferring the costs of examining customer complaints to the supplier

**Six grey unfair trading practices** - These are allowed only if agreed beforehand in a clear and unambiguous manner.

11. Return of unsold products
12. Payment of the supplier for stocking, display and listing
13. Payment of the supplier for promotion
14. Payment of the supplier for marketing
15. Payment of the supplier for advertising
16. Payment of the supplier for staff of the buyer, fitting out premises

### **National transposition<sup>4</sup>**

When transposing the Directive into their national law, EU countries can choose to be stricter than the Directive and *go beyond its scope*<sup>5</sup>. However, they cannot offer less protection than that foreseen by the Directive.

### **Example of expanded scope from Belgium**

First of all, the Belgian legislator chose to broaden the scope of the new rules. The UTP Directive offers protection along the agri-food supply chain depending on the relative size of operators. However, the UTP Law's scope of application is broader and does not include the various thresholds set out in the UTP Directive. On the one hand, the Belgian legislator thought it would be impractical for the parties involved to have to check the other party's turnover. On the other hand, this figure is likely to change on an annual basis and therefore a lawful practice could be prohibited the following year.

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<sup>4</sup> See key provisions and mechanisms of selected EUMS for transposition and enforcement of the UTP Directive at annex 1

<sup>5</sup> Member States, when transposing the Directive into their national law, can choose to be stricter than the Directive and go beyond its scope. However, they cannot offer less protection than foreseen by the Directive. E.g. Member States may provide for even shorter payment deadlines for perishable products (e.g. 20 rather than 30 days foreseen in the Directive). Member States can also go beyond the Directive and e.g. provide for a longer list of unfair trading practices that are prohibited or protect a larger number of suppliers or also protect buyers from certain unfair behaviour of suppliers.

For the above reasons, it was decided to protect all suppliers regardless of their size, as long as their annual turnover does not exceed EUR 350 million. This threshold is calculated on the basis of the consolidated worldwide annual turnover. According to the Belgian legislator, suppliers with a turnover exceeding EUR 350 million are not to be considered as weak parties and therefore do not need to be explicitly protected.

This exclusion does not apply, however, if the supplier is a recognised producer organisation. Since these organisations are also in a vulnerable position due to the market situation, the Belgian legislator decided to grant them the same level of protection.

As the concept of perishable products is difficult to delimit and in order to avoid discussions between the parties as to whether or not a product should be considered as perishable (i.e. unfit for sale or not within 30 days after harvest, production or processing), the Belgian legislator chose to abandon this distinction. The unfair practices prohibited in all circumstances therefore cover both perishable and non-perishable products, thus ensuring a better protection for suppliers.

As the distinction between perishable and non-perishable food was not introduced in the transposition legislation, two of the prohibited practices set out in the black list of the UTP Directive are subject to broader protection in the Belgian UTP Law:

- The maximum payment period is of 30 days for both perishable and non-perishable agri-food products, whereas the maximum payment period set out in the UTP Directive is 60 days for non-perishable agri-food products.
- The principle that a buyer cannot cancel an order within 30 days applies not only to perishable agri-food products but also to non-perishable agri-food products.
  2. The UTP Law is applicable as soon as the supplier and/or the buyer is/are established in Belgium. Protection is thus also offered to companies outside Belgium and even outside the European Union when selling to Belgian purchasers.
  3. Furthermore, the Belgian UTP Law does not include the distinction provided for in the UTP Directive between products intended for human consumption and products intended for animal consumption, nor between perishable and non-perishable agri-food products. The protection against unfair trading practices applies to all suppliers of any of these products in the same way.

Indeed, as it is not always clear at the time of delivery what the destination of agri-food products will be, the scope has been extended to all agri-food products intended for human or animal use (food and feed). In order to avoid enforcement difficulties, the prohibition of unfair practices in the agricultural and food chain applies as soon as the product supplied is intended for food in the general sense. An example would be cereals for biscuits which can also be processed into dog biscuits.

## **Complaints and protection of complainant**

The Directive contains measures, including the protection of the complainants, to help weaker suppliers exercise their rights. They can choose which enforcement authority they want to file a complaint with their national authority, or the authority of the EU country, where the buyer is located.

- A supplier can submit a complaint to the national enforcement authority
- A supplier can choose to which authority it wants to file a complaint: the authority of its Member State or the authority of the Member State, where the buyer is located



- The complainant can request his identity to be protected
- A supplier may turn to a producer organisation (e.g. cooperative) or other organisations with legitimate interest in representing him to file the complaint on his behalf
- The authority may open investigations on its own initiative (e.g. on the basis of some anonymous hints)

### **Impact on Ukrainian exporters**

Article 12 of the preamble states "**Suppliers in the Union should be protected** not only against unfair trading practices by buyers that are established in the same Member State as the supplier or in a different Member State than the supplier, but **also against unfair trading practices by buyers established outside the Union**. Such protection would avoid possible unintended consequences, such as choosing the place of establishment on the basis of applicable rules. **Suppliers established outside the Union should also enjoy protection against unfair trading practices when they sell agricultural and food products into the Union**. Not only are such suppliers liable to be equally vulnerable to unfair trading practices, but a broader scope could also avoid the unintended diversion of trade towards non-protected suppliers, which would undermine the protection of suppliers in the Union.

**Article 1: "Subject matter and scope"** states "This Directive applies to sales where either the supplier or the buyer, or both, are established in the Union."

### **Key questions and issues which arise from the EU legislation**

- Which Ukrainian institution will be the most appropriate Ukrainian enforcement authority<sup>6</sup> bearing in mind the profile, type, size and number of the potential complainants and the possible competition issues? (*DE - Federal Office for Agriculture, IE Minister, NL Committee, EST Competition Authority, CR Competition Agency, PL Polish Competition Authority*).
- Which Ukrainian legislation (new or amending existing) can be best used to impose these requirements define these offences and which laws need to be revised to provide for the sanctions? (DE amended Agricultural Organizations and Supply Chain Act, IE + NL + EST +CR new Unfair Trading Practices in the Agricultural and Food Supply chain PL replacing previous law on Counteracting the Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products
- What type and which level of sanctions (e.g. fines) will be effective in disincentivising non-compliance (DE up to 750,000 euros, IE on summary conviction, to a class A fine or to imprisonment for a term not exceeding 6 months or to both, or on conviction on indictment, to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years or to both, NL maximum of € 900,000 or, if that is more, 10% of the turnover of the offender, EST for natural person 300 fine units (1200 euros) or seizure / for legal person - up to EUR 400 000, CR A fine of up to HRK 3,500,000.00 (465,863.57 Euros) for a legal person or up to a maximum of HRK 1,500,000.00 (199,617.46 Euros) for a natural person - for serious violation of this Act by a legal or natural person,
- Will the rights be enforced based on complaints only or also ex officio? (DE + ex officio,

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<sup>6</sup> A list of EUMS enforcement authorities is attached at annex 2

CR + ex officio)

- What will be the economic cost of introducing this system and who will bear it
- How will complainants be protected?
- How could Ukrainian exporters rights be protected within the EU MS?
- How could EU exporters rights be protected in Ukraine?

### **3. COMMENTS ON THE KEY PROVISIONS OF THE MEMORANDUM AND THE DRAFT LAW (IN ITALICS)**

The problem analysis identified in the memorandum is in essence in line with the that of the Directive i.e. *"...an abuse of the prevailing market power, which leads to the use of unscrupulous and unfair practices that are contrary to the customs of business, put national producers of agricultural and food products in a disadvantageous position and lead to the decline of the food production industry..."*

The draft law accordingly seeks to define and prohibit unfair practices which are listed below and commented in light of the EU Directive.

#### **UNFAIR TRADE PRACTICES**

*Article 19-1. Unfair trade practices in the field of supply and sale of food products, pet food*

**Comment:** The scope of the draft law is expanded to include feed in addition to food. Whilst feed is not included in the scope of the Directive, there is no explicit exclusion and there is a general provision to allow the expansion of the scope and indeed some Member States (including Belgium – see above) have explicitly extended the scope to cover feed.

*Unfair trade practices are:*

*1) establishment of conditions for the purchase and sale (supply) of food products and pet food, which provide for:*

*payment by the supplier of including the product in the assortment (change in assortment) of food products and pet food of the subject of trade activity;*

**Comment:** transposes Article 3. 2 (b) "the supplier is charged payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market;"

The Directive includes a proviso to this prohibition i.e. "unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer" (hereafter "the agreement proviso") which is not transposed in the draft law although there is a provision for a separate agreement for provision of trade services at article 19-3.

*reimbursement by the supplier of food products and pet food for expenses related to the loss or damage of food products after the transfer of ownership of such goods, except for cases where the loss or damage occurred due to the fault of such supplier of food products and pet food;*

**Comment:** Transposes Article 3.1 e) "the buyer requires the supplier to pay 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;"

*reimbursement by the supplier of food products and pet food for costs related to the disposal or destruction of unsold food products and pet food, except for cases related to the disposal of food products, pet food due to their non-compliance with safety and quality standards, risk to the life or health of consumers or due to manufacturing defects;*

**Comment:** Transposes Article 3.2 (a) "the buyer returns 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;" In the Directive this provision is subject to the agreement proviso.

*collection of a fine from the supplier of food products and pet food, not related to the quality, quantity and timing of deliveries of food products and pet food, in the amount of more than one percent of the total cost of food products and pet food supplied;*

*collection of a fine from the supplier of food products and pet food for breach of obligations regarding the quality, quantity and delivery terms of food products, pet fodder, in the amount of more than ten percent of the cost of such food products and pet food;*

*the use of offsets when calculating for delivered food products, pet food and settlements between the parties to the contract in non-monetary form;*

**Comment:** There are no such provisions in the Directive

*return to the supplier of delivered food products, pet food or their replacement, except in cases where such return or replacement is due to the improper quality of food products and pet food, their damage caused by the fault of the supplier of such food products and pet food;*

**Comment:** transposes Article 3.2 (a) the buyer returns 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;

*discriminatory conditions for different suppliers of the same food quality products, pet food;*

*the possibility of involving a supplier of food products and pet food without remuneration to the activity of the subject of trade activity;*

**Comment:** There are no such provisions in the Directive

*the possibility of cancelling the supply of perishable food products and pet food, except for the case when such cancellation is notified at least 30 calendar days before the delivery date;*

**Comment:** transposes article 3.1 b) "the buyer cancels orders of perishable agricultural and food products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercialising or using those products; notice of less than 30 days shall always be considered as short notice; Member States may set periods shorter than 30 days for specific sectors in duly justified cases;"

*a ban on entering into contracts for the purchase and sale (supply) of food products and pet food with other business entities, as well as any fines or other negative consequences for concluding such contracts;*

**Comment:** There is no such provision in the Directive

*the possibility of unilaterally changing the terms of the contract for the sale (supply) of food products and pet food, in particular, those related to frequency, method, place, terms (periods) or volumes of supply, conditions regarding quality, payment or prices (cost);*

**Comment:** Transposes Article 3.1 (c) "the buyer unilaterally changes the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the provision of services insofar as these are explicitly referred to in paragraph 2;"

*imposition and/or recovery from the supplier of food products and pet food of any costs and/or losses of the subject of trade activity, which are not directly related to the supplier's violation of its obligations and/or do not depend on actions or inaction such supplier;*

**Comment:** There is no such provision in the directive

*2) illegal collection, use or disclosure of trade secrets of a supplier of food products, pet food, including imposing conditions on the supplier to provide any information regarding contracts with other buyers concluded by the supplier;*

*Comment: transposes Article 3.1 g) "the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council*

*It is prohibited to impose and/or recover from the supplier of food products and pet food any costs and/or losses that the subject of trade activity suffers or may suffer during the performance of his economic activity and which are not directly related to the violation by the supplier of its obligations and/or are not dependent on the actions or inaction of such supplier.*

*Provisions of contracts that contain terms of unfair trade practices, defined in paragraph 1 of this article, are null and void.*

**Comment:** There are no such provisions in the Directive

*Article 19-2. Peculiarities of settlements of subjects of trade activity with suppliers of food products and pet food*

*Settlements of subjects of trade activity with suppliers of food products and pet food are carried out:*

- 1) for food products, the expiration date of which is set up to ten days inclusively, - no later than ten calendar days from the date of actual receipt of such food products by the subject of trade activity;*
- 2) for food products, the minimum expiration date of which is set from eleven to sixty days inclusively, - no later than thirty calendar days from the date of actual receipt of such food products by the subject of trade activity;*
- 3) for food products, the minimum expiration date (date) of which is set for more than sixty days, - not later than sixty calendar days from the date of actual receipt of such food products by the subject of trade activity;*
- 4) for pet food, - no later than thirty calendar days from the date of actual receipt of such pet food by the subject of trade activity.*

*In the event of a delay by the supplier of food products and pet food in providing the subject of trade activity with the documents required by law and the contract for the sale (delivery) of food products, the terms of payment for the delivered food products established by the Article shall be extended by the period of such delay.*

*A penalty of 0.5 percent of the arrears is charged for each day of delay in favor of the supplier of food products and pet food, and in the case of a delay of more than thirty calendar days, a fine of twenty percent of the arrears is additionally charged.*

*In the event of a delay in payments for the supplied food products and pet food, the supplier of food products and pet food has the right to stop the supply until full settlement with him. At the same time, fines are not applied to him for violation of the terms of delivery of food products and pet food.*

*In the event of a delay in payments for the delivered food products and pet food for more than thirty calendar days, the supplier has the right to prematurely terminate the supply contract unilaterally without applying any penalties on the part of the subject of trading activity.*

*In the event of a delay in the delivery of food products and pet food or their incomplete delivery due to the fault of the supplier, the subject of trade activity has the right to suspend payment for the batch of food products and pet food for which the delivery was delayed or not complete. At the same time, fines are not applied to such an entity for violating the terms of payment for a batch of food products and pet food that was delivered with a delay or in an incomplete amount.*

*In the event of a delay in the delivery of food products and pet food for more than thirty calendar days, and for food products with a shelf life of less than sixty days, for a third of the shelf life, the subject of trade activity has the right to early termination of the supply contract.*

**Comment:** The Draft Law specifies and targets sanctions for payment delay differently to the Directive:

Article 3.1 (i) where the supply agreement provides for the delivery of products on a regular basis:

for perishable agricultural and food products, later than 30 days after the end of an agreed delivery period in which deliveries have been made or later than 30 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;

for other agricultural and food products, later than 60 days after the end of an agreed delivery period in which deliveries have been made or later than 60 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;

for the purposes of the payment periods in this point, the agreed delivery periods shall in any event be considered not to exceed one month;

(ii) where the supply agreement does not provide for the delivery of products on a regular basis:

— for perishable agricultural and food products, later than 30 days after the date of delivery or later than 30 days after the date on which the amount payable is set, whichever of those two dates is the later;

— for other agricultural and food products, later than 60 days after the date of delivery or later than 60 days after the date on which the amount payable is set, whichever of those two dates is the later.

Notwithstanding points (i) and (ii) of this point, where the buyer sets the amount payable:

— the payment periods referred to in point (i) shall start to run from the end of an agreed delivery period in which the deliveries have been made; and

— the payment periods referred to in point (ii) shall start to run from the date of delivery;

*The subject of trade activity, which owns a trade network, bears subsidiary responsibility for the obligations of subjects of trade activity connected with it by control relations within the meaning of Article 1 of the Law of Ukraine "On Protection of Economic Competition".*

*For the purposes of this Law, a trade network is a set of two or more trade facilities (a building, structure or part thereof, equipped with trade and technological equipment and intended for the trade of food products), which are used by a subject of trade activity or several subjects of trade activity, which are included in one group of business entities in accordance with antimonopoly legislation, under a single commercial name or another means of individualization, including under the terms of a commercial concession (franchising) agreement.*

**Comment:** The Draft Law explicitly targets a specific type of business (trade network) rather than an economic entity defined by economic power and potential to abuse that power

#### *Article 19-3. Trade cooperation*

*Advertising, marketing, logistics services, services for the preparation, processing, packaging of food products and pet food, other services related to the sale of food products to the end consumer may be provided by the subject of trade activity (or persons related to with him in control relations within the meaning of Article 1 of the Law of Ukraine "On the Protection of Economic Competition") exclusively on the basis of a separate agreement on the provision of such services concluded with the supplier of food products and pet food (hereinafter - the agreement on trade cooperation).*

*The cost of services provided under the trade cooperation agreement for a certain period of time cannot exceed ten percent of the total cost of food products and pet food, which were delivered on the basis of all contracts concluded between such business entities (taking into account persons who bound by control relations within the meaning of Article 1 of the Law of Ukraine "On the Protection of Economic Competition") by purchase and sale (supply) contracts for the same period of time.*

*In case of exceeding the limits specified in this article, the corresponding difference shall be returned to the supplier, food products by the subject of trade activity within 10 calendar days from the moment of issuing the corresponding demand";*

**Comment:** provision 19.3 may be deemed to transpose the "agreement proviso"

Article 3.2 "trading practices are prohibited, unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer"

#### **Provisions of the Directive not explicitly provided for in the Draft Law**

The following provisions and articles from the Directive are not explicitly regulated in the Draft Law:

1. (f) the buyer refuses to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation; this shall not apply where the supply agreement concerns products to be delivered by a member of a producer organisation, including a cooperative, to the producer organisation of which the supplier is a member, if the statutes of that producer organisation or the rules and decisions provided for in, or derived from, those statutes contain provisions having similar effects to the terms of the supply agreement;

(h) the buyer threatens to carry out, or carries 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;

(i) the buyer requires 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.

2. (d) the buyer requires the supplier to pay for the advertising by the buyer of agricultural and food products;

(f) the buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products.

- Article 5 Complaints and confidentiality
- Article 6 Powers of enforcement authorities
- Article 7 Alternative dispute resolution

### **Comment**

As noted at the beginning of the analysis, there is no specific obligation for the Ukrainian authorities to fully transpose this Directive at the current stage or by a specific deadline.

The Draft Law provides for future legislative activity in respect of related and subordinate regulation as follows: The Cabinet of Ministers of Ukraine within three months from the date of entry into force of this Law shall adopt normative legal acts necessary for the implementation of this Law; bring its normative legal acts into compliance with this Law; ensure that the ministries and other central bodies of executive power bring their regulatory acts into compliance with this Law. The Antimonopoly Committee of Ukraine shall, within three months from the date of entry into force of this Law, bring its normative legal acts into compliance with this Law.

### **Issues regarding international trade agreement obligations**

The explicit mention of national producers and processors in the memorandum could theoretically raise the issue of compliance with the WTO national treatment principle.

## **4. OUTSTANDING ISSUES**

- Which Ukrainian institution will be the most appropriate Ukrainian enforcement authority bearing in mind the profile, type, size and number of the potential complainants and the possible competition issues?
- The role and mechanism of complaints How will complainants be protected?
- Will the rights be enforced based on complaints only or also ex officio?
- The economic costs of the new requirements (RIA)

- How could Ukrainian exporters right be protected within the EU MS?
- How could EU exporters rights be protected in Ukraine?

Whilst the focus of the Draft Law is addressing domestic market dysfunctions and the majority of the above the issues are about domestic implementation and enforcement mechanisms, which can be regulated in the related and subordinate legislation, it is recommended to consider by what mechanisms, Ukrainian agri-food exporters to the EU might avail themselves of the rights afforded to them by the Directive.

## **5. CONCLUSIONS**

The Draft Law begins the process of transposition of the to the EU DIRECTIVE 2019/633 in line with the general approximation obligation of the AA and it quite appropriately prioritises and focuses on issues most relevant and specific to the Ukrainian situation and stage of market and sectoral development.

Consistent with the choice of the Directive by the EU as the regulatory instrument, Ukrainian lawmakers have defined provisions to achieve the objectives of the Directive in the Ukrainian context and using mechanisms most appropriate to that.

Many of the substantive provisions of the Directive have been directly transposed in the Draft law and in keeping with the intentions of the Directive and the practice of some Member States, the scope and level of protection have often been expanded beyond the minimum requirement and in innovative and thoughtful ways.

Several provisions have not been fully transposed at this stage, but this is in line with the general approximation provisions of the Association Agreement. There are certain formulations which would benefit from clarification and refinement to ensure full compliance with international obligations and some further work on assessment of the regulatory impact but in general the Draft Law is well conceptualised and is highly likely provide a solid framework to enable law makers to reduce the use of unfair trade practices in food trade.

This is a Directive which presented political and technical challenges to many EU member states as evidenced by the time and effort taken to introduce domestic legislation. Ukrainian stakeholders and lawmakers should be lauded and supported in their legislative efforts to increase the fairness of the Ukrainian agri-food market.



## **ANNEX 1 EU MEMBER STATES NATIONAL IMPLEMENTATION EXAMPLES**

### **GERMANY**

Germany amended legislation on *Agrarorganisationen<sup>7</sup>-und-Lieferketten* ("AgrarOLkG" - Agricultural Organizations and Supply Chain Act)<sup>8</sup> to implement the European Union's Unfair Trading Practices Directive ("UTP") which came into force on 9<sup>th</sup> June 2021.

For example, under the AgrarOLkG and in line with the UTP provisions, buyers cannot:

- Pay beyond certain deadlines (30 or 60 days, depending on the product).
- Return unsold products without certain compensation.
- Cancel orders on short notice.
- Require the supplier to share in the costs of storing delivered products or other costs that arise through no fault of the supplier.
- Have unilateral authority to amend sales contracts with respect to delivery, quality, payment terms, prices, storage, and certain other terms.
- Retaliate against a supplier for, among other things, asserting its legal or contractual rights.
- Refuse to confirm supply agreements in writing.
- Disclose the supplier's trade secrets.

The AgrarOLkG, which went into effect on **June 9, 2021**, applies to buyers with total revenues of €2 million or more if they source food products from smaller suppliers, as measured by comparative revenue. The AgrarOLkG protection applies to suppliers with revenues of up to €350 million, and in some cases of up to €4 billion.

#### **Enforcement**

The Federal Ministry is authorised by the law to designate the Federal Office for Agriculture and Food BLE as the competent authority... The BLE is responsible for enforcing the provisions ....provided that the supplier or the buyer or both are or are established in Germany (enforcement authority).

Suppliers who are affected by unfair trading practices can file<sup>9</sup> a complaint with the BLE. It acts as the enforcement authority for the new regulations and can also initiate ex officio investigations. The BLE makes decisions about violations of the new bans in agreement with the Federal Cartel Office. Fines of up to 750,000 euros can be imposed.

#### **Powers and obligations of the enforcement authority**

The enforcement authority shall have the power to:

- initiate and carry out investigations on the basis of a complaint or ex officio...
- to establish, after consulting the Buyer, a breach of one of the prohibitions...and to make the orders necessary to remedy the infringement and to prevent future infringements,
- to publish their decisions..
- publish guidelines on the classification of products as perishable

The enforcement authority shall publish an annual report on its activities and shall provide

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<sup>7</sup> This legislation also deals with other agricultural market issues such as agricultural Producer Organisations

<sup>8</sup> <https://www.gesetze-im-internet.de/agrarmsg/BJNR091710013.html>

<sup>9</sup> the Supplier and the Buyer may agree to use alternative dispute resolution procedures

information and assistance to and regularly meet with the enforcement authorities of the other Member States.

### **Sanctions**

The sanctions for violations are severe. The *Bundesanstalt für Landwirtschaft und Ernährung* ("BLE"), the Federal Office for Agriculture and Food, may issue fines of up to €750,000 for each violation.

### **IRELAND**

Statutory Instrument<sup>10</sup> (SI) **No. 198 of 2021** European Union (Unfair Trading Practices in the Agricultural and Food Supply chain) Regulations 2021<sup>11</sup> was published in "Iris Oifigiúil"<sup>12</sup> on 30th April 2021

As well as specifying the banned practices in line with the UTP Directive, the Irish legislation provides for **enforcement** mechanisms and **compliance notices** as follows:

#### **Enforcement**

Suppliers may address complaints to the Minister. Where the Minister considers that there are sufficient grounds for acting on a complaint, he or she shall initiate, conduct and conclude an investigation of the complaint within a reasonable period of time.

#### **Appointment of authorised officer**

The Minister may appoint in writing such persons or classes of persons as he or she considers appropriate to be authorised officers for the exercise of all or any of the functions conferred on an authorised officer under these Regulations, as specified in the appointment.

#### **Compliance notice**

Where an authorised officer is of the opinion that these Regulations or the UTP Directive is not being or has not been complied with, or there are reasons to believe that these Regulations or the UTP Directive will not be complied with, the officer may serve a "compliance notice" which shall:

- require the person to whom it is served to take such action as specified in the notice,
- inform the person to whom it is served that he or she may appeal the notice in the District Court ...and
- state that if the person to whom it is served fails to comply with the notice, he or she commits an offence and is liable to a penalty

#### **Penalties and prosecutions**

A person who commits an offence under these Regulations is liable:

- on summary conviction, to a class A fine or to imprisonment for a term not exceeding 6 months or to both,

or

- on conviction on indictment, to a fine not exceeding €500,000 or to imprisonment for a term not exceeding 3 years or to both.

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<sup>10</sup> In Ireland the term "statutory instrument" is given a broad meaning. Under the Statutory Instruments Act 1947 a statutory instrument is defined as being "an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute"

<sup>11</sup> <https://www.gov.ie/en/publication/a1e6f-unfair-trading-practices-enforcement-authority/>

<sup>12</sup> Official gazette of the Government of Ireland.

The *UTP Regulations* state that the Minister for Agriculture, Food and the Marine is currently designated as the relevant enforcement authority in the State. As an interim measure, the minister has created a UTP Enforcement Authority (UTPEA) within the department, pending (as stipulated by the current Programme for Government) the adoption of primary legislation creating a National Food Ombudsman (NFO). Once this happens, the NFO will succeed the minister as the national enforcement authority for the regulations.

The minister/UTPEA (acting through its authorised officers) currently has the power to:

- Conduct investigations, either on its own initiative or upon receipt of a complaint,
- Require buyers and suppliers to provide all necessary information,
- Carry out unannounced on-site investigations,
- Take decisions if an infringement is found and require the buyer to bring the prohibited trading practice to an end by issuing a compliance notice,
- Initiate court proceedings for the imposition of fines, and
- Publish decisions following the conclusion of the investigation.

Reflecting in many respects the powers granted to the Competition and Consumer Protection Commission, these enforcement powers are very extensive, if not draconian.

For example, an authorised officer, if he/she has reasonable grounds for believing that an offence under the *UTP Regulations* has occurred (or is occurring), has the power to search premises/vehicles, seize documents, detain vehicles/other modes of transport, and/or remove equipment, including computers/servers.

Moreover, an authorised officer may use reasonable force to exercise his/her functions under the regulations. Finally, an authorised officer may enter a private dwelling if he/she believes evidence of an infringement is likely to be destroyed. Given the underlying activity that the regulations are trying to prevent, it is questionable as to whether such strong powers of enforcement are proportionate.

### **Complaints/investigations**

Part 3 of the regulations sets out conditions under which suppliers may address complaints to the minister/UTPEA. In order for such a complaint (which can be anonymous) to be actioned, either the supplier or the buyer must be established in the State.

On receipt of such a complaint, the minister/UTPEA must inform the complainant within a reasonable period of time regarding how it intends to proceed.

The *UTP Regulations* also set out a requirement for the publication of an annual report by the minister/UTPEA detailing the number of complaints received and the number of investigations initiated or concluded during the previous year.

The minister/UTPEA also has discretion to publish details of its decisions relating to infringements, such as where the buyer was required to cease a prohibited UTP, or decisions concerning the imposition or initiation of proceedings for the imposition of fines, penalties, or interim measures.

If, following an investigation, the minister/UTPEA concludes that a breach of the *UTP Regulations* and/or the 2019 directive has occurred or is occurring, it may issue a compliance notice requiring the buyer to take appropriate action.

Failure to comply with such a notice is a criminal offence, leading, on indictment, to a

prison sentence of up to three years and/or a fine of a maximum of €500,000. Again, these potential penalties are hefty and should act as a strong deterrent.

## **NETHERLANDS**

The Law of 3 March 2021, laying down rules implementing 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 (PbEU 2019, L 111/59) (Act on Unfair Trading Practices in the Agricultural and Food Supply Chain)<sup>13</sup> was published on 15.04.2021

As well as specifying the banned practices in line with the UTP Directive, the Dutch legislation provides for compensation and dispute resolution as follows:

Article 4 deals with the issue of **compensation** as follows:

Where compensation is required by the buyer for the situations referred to in Article 3(b), (c), (d), (e) and (f), the buyer shall, on request, provide the supplier with a written estimate of the amount to be paid, each or in total, as appropriate and, in so far as the situations referred to in Article 3 are concerned, parts b, d, e and f, a written estimate of the costs to the supplier and of the elements on which that estimate is based.

Article 6 defines the **dispute resolution** mechanism as follows:

The Minister may appoint a committee responsible for settling disputes between buyers and suppliers ...Decisions of a committee designated on the basis of the first paragraph shall be binding on the parties, unless one of the parties submits the dispute to which the judgment relates to the civil court within three months of the adoption of the judgment.

The Netherlands Authority for Consumers and Markets is tasked with monitoring the enforcement in cooperation with designated enforcement authorities and may impose an administrative fine (maximum of € 900,000 or, if that is more, 10% of the turnover of the offender) or impose an order for incremental penalty payments.

## **CZECH REPUBLIC**

A law on "Significant market power in the sale of agricultural and food products" that will substantially alter current legislation has recently entered the legislative process.

The Amendment to the Law on the importance of market power in the sale of land and consumer products transposes the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (the "Directive").

The bill significantly amends the current laws preventing abuse of significant market power on the buy side in the food industry for the purpose of its resale in the Czech Republic or the provision of services related to the sale of food. Existing agreements must be amended to comply with the new regulation within 12 months from the entry into effect of the bill.

Significant market power

The regulation applies to customers with annual turnover exceeding EUR 2 million. In addition to customer annual turnover, supplier annual turnover is also of decisive importance for determining the scope of the Directive in relation to a specific business

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<sup>13</sup> <https://zoek.officielebekendmakingen.nl/stb-2021-178.html>

relationship.

### **Essential elements and form of agreements**

If the customer has significant market power, agreements with the supplier must fulfil certain requirements. In particular, the agreement must be in writing and must be concluded (i) either before the start of the supply or processing of agricultural and food products or (ii) before the receipt or provision of services.

The agreement must include:

- Purchase price: Amount of the discount, method of discount calculation, method of payment, payment term.
- Product: Determination of its quantity over a period of time or of individual deliveries.
- Related services: Specification of services, prices, method of payment, payment term.
- Sales-related promotions: Specification, estimated quantity, sale price, and duration.

### **Unfair trading practices**

The bill sets out an exhaustive list of prohibited trading practices and divides them into two categories – prohibited and conditionally prohibited practices.

#### **Prohibited trading practices, such as:**

- negotiation or enforcement of contractual terms that constitute a significant imbalance of rights and obligations to the disadvantage of the supplier,
- granting or obtaining of a payment, discount or other performance, the amount, subject matter and scope of which are not agreed in writing in advance,
- unequal treatment of a supplier consisting in different contractual terms for the purchase or sale of the supplier's agricultural and food products for comparable consideration without any fair reason,
- unilateral changing of contractual terms concerning frequency, method, place or volume of the supply or delivery of agricultural and food products, quality standards, the terms of payment or price,
- tying of consent to the conclusion of an agreement to the condition of further performance,
- failure to comply with the mandatory written form of the agreement or failure to negotiate an essential element of the agreement,
- requirement of payments that are not related to the sale of agricultural and food products,
- threat or enforcement of retaliation in the event that a supplier exercises its contractual or legal rights,
- unauthorized acquisition, use or disclosure of a supplier's trade secrets,
- conclusion or enforcement of a pricing condition which results in an invoice not containing a final price,
- auditing of or use of other forms of control over the supplier by the customer,
- stipulation or enforcement of a payment for the deterioration or loss of agricultural and food products that occurs on the customer's premises or after ownership has been transferred to the buyer (when not caused by the supplier),
- cancellation of orders of perishable agricultural and food products at short notice (less than 30 days before the delivery date), etc.

**Conditionally prohibited practices**, i.e., practices that are prohibited unless they have been previously agreed in clear and unambiguous terms between the supplier and the customer with significant market power:

Conclusion or enforcement of a payment:

- for all or a part of the costs of any discounts on agricultural and food products that are sold by the customer as part of a promotion
- for advertising by the customer of agricultural and food products,
- for staff for preparing premises used for the sale of the supplier's products.

### **Offences**

The bill also stipulates a list of offences. In particular, a customer with significant market power commits an offence by (i) using any of the unfair trading practices, (ii) failing to comply with an obligation agreed with the relevant authority, or (iii) failing to provide the relevant authority with complete, correct and truthful documents or information, including books of account, other business records or other documentation that may be of relevance for clarifying the subject matter of the proceedings.

The maximum fine is CZK 10,000,000 or 10% of the customer's net turnover. The fine may be reduced by 20% provided that the accused entity admitted to having committed an offence and the relevant authority considers such penalty to be sufficient.

The bill is at the beginning of the legislative process and may undergo significant changes. Currently, it should come into effect on the first day of the second month following its publication. The transitional period for agreements concluded before the date of entry into effect of the Act that conflict with the new statutory requirements is 12 months. After this period, the contracting parties are obliged to amend the existing agreements to comply with the new regulation.

## **ROMANIA**

The new Law no. 81/2022 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ("Law no. 81/2022"), which transposes the EU Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (the "Directive") finally enters into force.

Thus, Law no. 81/2022 was just published in the Romanian Official Gazette of 12 April 2022, as the legislative procedure was accelerated after the European Commission decided to send a reasoned opinion to Romania, giving it two months to remedy the failure to transpose the Directive.

The new Law introduces significant fines and specific compliance obligations, aiming to strengthen the farmers' position in the food supply chain and prohibits certain unfair trading practices such as late payments and last-minute order cancellations, as follows:

- it applies to sales conducted in Romania or that have effects in Romania;
- it does not apply to agreements between suppliers and consumers;
- it applies to sales of agricultural or food products between:
  1. suppliers whose annual turnover does not exceed EUR 2,000,000, to buyers whose annual turnover exceeds EUR 2,000,000;
  2. suppliers whose annual turnover exceeds EUR 2,000,000, but is less than EUR

- 10,000,000, to buyers whose annual turnover exceeds EUR 10,000,000;
3. suppliers whose annual turnover exceeds EUR 10,000,000, but is less than EUR 50,000,000, to buyers whose annual turnover exceeds EUR 50,000,000;
  4. suppliers whose annual turnover exceeds EUR 50,000,000, but is less than EUR 150,000,000, to buyers whose annual turnover exceeds EUR 150,000,000;
  5. suppliers whose annual turnover exceeds EUR 150,000,000, but is less than EUR 350,000,000, to buyers whose annual turnover exceeds EUR 350,000,000;
  6. suppliers whose annual turnover does not exceed EUR 350,000,000 with all buyers that are public authorities.
- it applies to commercial contracts concluded after the date of its entry into force.

Law no. 81/2022 provides that the contracts concluded before its entry into force should be amended until 31 December 2022, so as to comply with its provisions.

Law no. 81/2022 expressly prohibits 25 main unfair trading practices of buyers, including exceeding the payment deadline by more than:

1. 14 calendar days from the due date set by the contract, in case of perishable agricultural and food products;
2. 30 calendar days from the due date set by the contract, in case of other agricultural and food products.

Perishable products are defined as products that by their nature or at their stage of processing are liable to become unfit for sale within 30 days after harvest, production or processing.

- setting a notice term for cancelling orders of products (irrespective if these are perishable or not) of less than 30 days;
- unilateral changes of the terms of the agreement that concern the frequency, method, place, timing or volume of the supply or delivery, the quality standards, the terms of payment or the prices, or as regards the provision of services;
- charging the supplier any costs that were not agreed by contract;
- applying financial and trade price reductions in the form of rebates, with the exception of discounts and refunds, the aggregate of which shall not exceed 20%, applied on the basis of the invoice value between the buyer and the supplier;
- charging the supplier for the deterioration and/or loss of 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;
- charging 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;
- returning unsold products to the supplier.

Law no. 81/2022 provides for certain exceptions to the unfair trading practices, such as in case of:

- public health institutions and public entities providing health services or
- supply agreements concluded between suppliers of grapes or must for wine production and their direct buyers, under certain conditions.

Also by way of exception, certain acts of the buyer will not be qualified as unfair

commercial practice, provided that, upon request of the supplier, such was agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer. The list is limited and comprises the acts of the buyer to:

1. require the supplier to pay for the advertising and for the marketing by the buyer of agricultural and food products;
2. require the supplier 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;
3. charge the supplier for staff for fitting-out premises used for the sale of the supplier's products or oblige the supplier to provide such staff;
4. refuse a price renegotiation within a period of more than 10 days from the date of the request;
5. require the supplier to pay for the secondary placement of its products for sale.

**Competent authorities:**

- Ministry of Agriculture and Rural Development – monitoring and reporting duties
- Competition Council – enforcement duties

Companies may address complaints to both authorities.

**Sanctions:**

- fines between RON 250,000 (roughly EUR 50,600) to RON 600,000 (roughly EUR 121,500) for the majority of unfair practices;
- fines of 1% of the total turnover in the previous financial year, for repeated unfair commercial practices.

The competent authority may also impose periodic penalty payments, amounting to 1% of the main fine imposed, for each day of delay, calculated from the date set by decision, to determine the sanctioned persons to:

1. cease certain unfair commercial practices;
2. comply with the obligations imposed by the decision of the Competition Council;
3. provide completely and correctly the requested information and documents;
4. subject to unannounced inspections.

In the event that, as a result of the unfair commercial practice, the supplier has suffered damages, the buyer will be obliged to pay three times the value of such damage.

The companies mainly concerned by the Law no. 81/2022 are buyers of agricultural and food products. These should:

- take into account the newly transposed legal provisions when drafting and executing contracts concluded after the entry into force of the law, and
- align all previous contracts falling within the scope of the law with the new provisions, until 31 December 2022.



## **ANNEX 2 EU MEMBER STATE (MS) ENFORCEMENT AUTHORITIES**

Each EU MS has designated a competent authority to enforce these rules. These authorities have the power to both launch investigations and fine operators who break the rules.

<b>Country</b>	<b>Enforcement authority</b>
Austria	Federal Ministry for Digital and Economic Affairs; Directorate III EU and international market strategies
Belgium	DG for Economic Inspection of the FPS Economy
Bulgaria	Commission for the Protection of Competition
Croatia	The Croatian Competition Agency (Agencija za zaštitu tržišnog natjecanja)
Cyprus	Department of Agriculture, Ministry of Agriculture, Rural Development and Environment
Czechia	Office for the Protection of Competition
Denmark	Danish Competition and Consumer Authority
Estonia	Estonian Competition Authority
Finland	Finnish Food Market Ombudsman
France	Directorate-General for Competition, Consumer Affairs and Fraud Control (DGCCRF)
Germany	Federal Office for Agriculture and Food (Bundesanstalt für Landwirtschaft und Ernährung - BLE)
Greece	Committee for Combating Unfair Trading Practices – Ministry of Rural Development and Food of Greece
Hungary	NEBIH (National Food Chain Safety Office)
Ireland	Minister for Agriculture, Food and the Marine & UTP Enforcement Authority
Italy	Italian Ministry of Agricultural, Food and Forestry Policies – ICQRF Department
Latvia	Competition Council of Latvia
Lithuania	Public Institution Rural Business and Markets Development Agency
Luxembourg	Conseil de la concurrence
Malta	Unfair Trading Practices Board
Poland	Urząd Ochrony Konkurencji i Konsumentów (Office of Competition and Consumer Protection)
Portugal	Autoridade de Segurança Alimentar e Económica
Romania	Consiliul Concurenței (Competition Council)
Spain	Agencia de Información y Control Alimentarios (AICA)
Slovakia	Ministry of Agriculture and Rural Development of the Slovak Republic
Slovenia	Slovenian Competition Protection Agency
Sweden	Swedish Competition Authority
The Netherlands	Authority for Consumers & Markets (ACM)