

## New unfair trading practices in the food supply chain



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Within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agri-food products are frequent. Those imbalances in bargaining power are likely to lead to unfair trading practices. The Directive 2019/633 (the “Directive”) aims to ensure that agri-food companies are protected against these unfair practices.

### Scope of the Directive

The Directive’s scope is very limited. First, it applies only to business-to-business relationships in the agricultural and food supply chain.

Its applicable scope is based on the relative size of the supplier and the buyer in terms of annual turnover. The Directive applies to certain unfair trading practices that occur in agri-food product sales:

**By a supplier that has an annual turnover of:**      **To a buyer that has an annual turnover of:**

Less than EUR 2,000,000

More than EUR 2,000,000

Between EUR 2,000,000 and EUR 10,000,000

More than EUR 10,000,000

Between EUR 10,000,000 and EUR 50,000,000

More than EUR 50,000,000

Between EUR 50,000,000 and EUR  
150,000,000

More than EUR 150,000,000

Between EUR 150,000,000 and EUR  
350,000,000

More than EUR 350,000,000

The Directive does not apply to agreements between suppliers and consumers.

### **Forbidden trading practices**

The Directive does not contain a general provision prohibiting unfair practices; instead, it has two lists of prohibited practices.

The first list contains practices that are prohibited in all circumstances:

- the buyer setting payment deadlines of more than thirty days for perishable agri-food products and of more than sixty days for other agri-food products;
- the buyer's cancelling on short notice any orders for perishable agri-food products;
- the buyer unilaterally deciding to make contract modifications;
- the buyer demanding payments not related to the sale of agri-food products;
- the buyer transferring the risks of loss and deterioration to the supplier;
- the buyer's refusal to confirm the supply contract in writing to the supplier, despite the latter's requests;
- the buyer unlawfully obtaining, using or disclosing the supplier's trade secrets;
- the buyer threatening commercial retaliation against the supplier if the supplier exercises his/her contractual or legal rights;
- the buyer claiming 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.

The second list contains practices that are prohibited unless they have been previously agreed in clear and unambiguous terms in the agreement between the parties:

- the buyer returning unsold agri-food products to the supplier without paying for these unsold products or without paying for the disposal of these products;
- the buyer charging the supplier for its agri-food products to be stored, displayed or re-branded or made available on the market;
- the buyer requiring the supplier to bear all or part of the costs relating to any discounts on agri-food products sold by the buyer in the context of promotional activities;

- the buyer charging the supplier for the advertising of agri-food products;
- the buyer charging the supplier for the marketing of agri-food products;
- the buyer charging the supplier for the staff responsible for fitting-out the premises used for the sale of the supplier's products.

### **Transposition into Belgian law**

Belgium has until 1 May 2021 to transpose this Directive into its national law and the provisions must be applied as from 1 November 2021.

As this is a minimum harmonisation directive, the Belgian legislator could decide to add other practices to the two lists above.

Following the Directive, the Belgian legislator will have to designate an authority responsible for monitoring, enforcing and punishing prohibited practices. Two questions arise in that regard:

1. Will the Belgian legislator create a new authority or will it entrust this task to an existing authority such as the Belgian Competition Authority?
2. Will Belgium also entrust this authority with the task of monitoring compliance with the Law of 4 April 2019 on unfair terms and unfair commercial practices between undertakings?

We will see in the coming months how the Belgian legislator will transpose this Directive. This should in any case encourage buyers in the agricultural and food supply chain to review some of their practices and adapt their contracts with agri-food suppliers.