

Newsletter UTP Directive

Unfair Trading Practices Austria

JANUARY 2022



WHAT IS THE UTP DIRECTIVE AND HOW IS IT IMPLEMENTED IN AUSTRIA?

The Federal Act on the Improvement of Local Supply and Competitive Conditions (*Bundesgesetz zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen; Faire-Wettbewerbsbedingungen-Gesetz – FWBG*) implements EU Directive 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain ("UTP Directive") into Austrian law. The Directive is implemented by amending the Local Supply Act (*Nahversorgungsgesetz – NahversG*), which is now entitled the Fair Competitive Conditions Act (*Faire-Wettbewerbsbedingungen-Gesetz – FWBG*).

In this context, reference should also be made to the 2018 guidance *Fairness in business* of the Austrian Federal Competition Authority ("FCA"). This guidance for fair conduct in business contains a list of business practices that do not comport with corporate good conduct from the standpoint of the FCA.¹ The catalog is expected to also be updated in light of the amendment.

The Act came into force on 1 January 2022. The deadline to implement the Directive already expired on 1 May 2021. This implementation is therefore late, which is why the EU

IN THIS ISSUE

WHAT IS THE UTP DIRECTIVE AND HOW IS IT IMPLEMENTED IN AUSTRIA?

WHO AND WHAT DOES THE ACT COVER?

TO WHICH SUPPLIERS/BUYERS DOES THE ACT SPECIFICALLY APPLY?

WHAT PRACTICES ARE PROHIBITED?

WHAT ARE THE LEGAL CONSEQUENCES, AND WHICH AUTHORITIES ARE RESPONSIBLE?

Commission has already initiated infringement proceedings against the Republic of Austria.

According to the EU, there is often a significant imbalance in the bargaining power of suppliers and buyers of agricultural and food products. According to the recitals of the UTP Directive, this imbalance in bargaining power is likely to result in unfair trading practices when, in a sale, larger and more powerful trading partners attempt to impose certain practices or contractual arrangements that are advantageous to them. The goal of the UTP Directive is thus to establish a Union-wide minimum standard to curb practices that can have a negative impact on the living standards of the agricultural community. The Directive allows Member States to adopt more stringent measures.

Austria's implementation of the UTP Directive is to be understood as a sector-specific favoring of suppliers of agricultural and food products over their (commercial) buyers. The suppliers tend to have less power to negotiate in comparison with the typically larger buyers. The Act will strengthen the suppliers' position by banning certain practices by the buyer.

¹ The Fairness Catalog is available at:
https://www.bwb.gv.at/fileadmin/user_upload/BWB_Fairnesskatalog_final.pdf.



WHO AND WHAT DOES THE ACT COVER?

The Act introduces a new section to the FWBG (formerly: NahversG), dealing specifically with unfair trade practices in the sale of **agricultural and food products**, where at least the **supplier** or the **buyer** is established in the EU. This supplements the existing general provisions on improving the conditions of competition (requirement of good commercial conduct, general prohibition of discrimination, obligation to supply, etc.).

"Agricultural and food products" means (i) products listed in Annex I to the TFEU² and (ii) products not listed in that Annex, but processed for use as food using products listed in that Annex.

The term **"supplier"** includes

- agricultural producers;
- individuals and legal entities who sell agricultural and food products;
- producer organizations; as well as
- supplier organizations, and
- associations of such organizations.

"Buyers" are entrepreneurs (both individuals and legal entities) who buy agricultural and food products.

Agreements between suppliers and consumers are not affected.

TO WHICH SUPPLIERS/BUYERS DOES THE ACT SPECIFICALLY APPLY?

The Act applies to commercial practices related to the sale of agricultural and food products, if certain turnover thresholds are met and the supplier has a lower turnover than the buyer. For example, the Act would apply to the sale of agricultural and food products from a supplier with an annual turnover of EUR two million or less, to a buyer with an annual turnover of over EUR two million.

Turnover is calculated using the companies' consolidated sales as defined in Recommendation 2003/361/EC of the EU Commission.³

Here is an overview of the turnover thresholds:

LIEFERANT (EUR)	KÄUFER (EUR)
Annual turnover ≤ 2 million	& 2 million < annual turnover
2 million < annual turnover ≤ 10 million	& 10 million < annual turnover
10 million < annual turnover ≤ 50 million	& 50 million < annual turnover
50 million < annual turnover ≤ 150 million	& 150 million < annual turnover
150 million < annual turnover ≤ 350 million	& 350 million < annual turnover
350 million < annual turnover ≤ 1 billion	& 5 billion < annual turnover

Although Austrian law already addresses relative market power, this concept is new on the European level and has just now been introduced with the UTP Directive. Usually, relative market power must be determined on a case-by-case basis, by assessing whether one negotiating partner is dependent on the other. In contrast, the UTP Directive uses the turnover thresholds to assume a de facto dependence between suppliers and buyers of agricultural and food products. This gives suppliers the significant advantage of legal certainty.

In terms of annual turnover, the Austrian regulation goes beyond the requirements of the UTP Directive. By additionally covering suppliers with turnover exceeding EUR 350 million, the Austrian law benefits larger suppliers than the Directive originally intended to.

² Treaty on the Functioning of the EU.

³ See Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ No. L 124 p. 36).



WHAT PRACTICES ARE PROHIBITED?

The FWBG adopts the UTP Directive's dichotomy of distinguishing between (i) trade practices that are prohibited without exception and (ii) trade practices that are prohibited if they have not been clearly and unambiguously agreed upon beforehand in the supply agreement or in a subsequent agreement between the supplier and the buyer. These two groups are listed in appendixes to the FWBG.

Appendix I – Trade practices that are prohibited without exception

Appendix I contains a specific list of prohibited trade practices between buyers and suppliers that meet the above thresholds.

In summary, the buyer is prohibited from the following trade practices, regardless of whether they are set unilaterally or agreed upon by the supplier:

1. excessively long payment deadlines after delivery (a distinction is made here between perishable and non-perishable agricultural and food products);
2. short-term cancellations (here, too, a distinction is made between perishable and non-perishable agricultural and food products);
3. unilaterally changing the terms of a supply agreement (regarding the frequency, method, location, timing, or volume of agricultural and food product delivery, quality standards, payment terms, or prices);
4. payments not related to the products purchased;
5. payments for quality degradation or losses that are actually the responsibility of the buyer;
6. refusal of written confirmation of the terms of delivery by the buyer;
7. unlawful acquisition or use of trade secrets/confidential knowledge of the supplier as defined in Directive (EU) 2016/943 on the protection of confidential know-how;
8. threats or retaliation of a commercial nature in the event of legal action by the supplier against the buyer;
9. compensation for the costs of handling customer complaints without even negligence on the part of the supplier;
10. different contractual terms without factual justification compared to other contracting parties (amount of the price or payment terms);
11. prohibition of self-marketing for suppliers of perishable original products when ensuring the agreed delivery quantity.

It should be noted that the Austrian legislature goes beyond the requirements of the UTP Directive with the prohibitions in 10) and 11) and provides for stricter regulations.



Appendix II - Practices that are permitted if they have been clearly agreed upon beforehand

Appendix II contains a list of commercial practices that are **allowed** if they have been clearly and unambiguously **agreed upon** beforehand in the supply agreement or a follow-up agreement between supplier and buyer:

1. return of unsold agricultural and food products by the buyer (without having paid for them),
2. payments made by the supplier to the buyer for the listing of its products,
3. cost bearing of the supplier for
 - price discounts of the buyer,
 - advertising of the buyer,
 - marketing of the buyer, or
 - the buyer's personnel for setting up the premises where the supplier's products are sold.

Any Questions?

Our E+H competition team is happy to help!

WHAT ARE THE LEGAL CONSEQUENCES, AND WHICH AUTHORITIES ARE RESPONSIBLE?



The sanctions for violating the FWBG are as follows:

- If a contract contains a prohibited trade practice, the provision in question is **null and void** (the rest of the contract remains in force). The new regulations apply to all contracts, whether executed before or after the effective date of the FWBG. Existing contracts must be amended to comply with the FWBG by 01 May 2022.
- The buyer faces a **fine up to EUR 500,000**, which the **FCA** must request from the Cartel Court. The FCA has extensive investigative powers at its disposal: it can demand information from companies and, in the case of suspected violations, also carry out dawn raids of the premises with the approval of the Cartel Court.

To assert its claims, a supplier established in Austria may file a complaint with the FCA, regardless of where the buyer is established. If the buyer is located in another EU member state, the FCA must then forward the complaint via the Federal Ministry for Digital and Economic Affairs to the investigating authority in the other EU member state where the buyer is established.

Suppliers not established in Austria may also file a complaint with the FCA if the buyer suspected of engaging in an unfair trade practice is established in Austria.

- In addition, the following claimants can seek **injunctive relief from the Cartel Court**:
 - the FCA, the Federal Cartel Prosecutor, the Austrian Federal Economic Chamber and a Chamber of Agriculture or the Presidential Conference of the Chambers of Agriculture (even if they are not claimants, they have standing in the proceedings in any case);

- associations representing economic entrepreneurial interests, producer organizations, other supplier organizations, and associations of such organizations, if their interests are affected by the subject matter of the proceedings;
- any entrepreneur whose legal or economic interests are affected by the subject matter of the proceedings.

Insofar as the requirements for prohibiting an infringement have been certified, the Cartel Court must, upon application by a party, issue the necessary orders by an interim injunction.

In order to avoid many years of litigation before the Cartel Court, the Austrian legislature has established an independent initial contact point at the Federal Ministry of Agriculture, Regions and Tourism, free of instructions, effective 1 March 2022. The initial contact point can conduct general advisory activities and a confidential analysis of complaint cases. Subsequently, it will assume a mediating role by:

- referral of the subject matter of the complaint to the respondent in agreement with the complainant,
- referral to a conciliation board, if the complainant and the respondent so desire; or
- referral to an appropriate advocacy group, in consultation with the complainant, if the initial point of contact deems it appropriate with regard to the handling of a specific complaint or because of the general importance of a complaint beyond the individual case.



E+H Eisenberger + Herzog Rechtsanwälts GmbH
Vienna Twin Tower, Wienerbergstraße 11, 1100 Vienna
Phone: +43 1 606 3647 0 E-Mail: office@eh.at

If you have any questions,
please contact the E+H competition team



Dieter Thalhammer
d.thalhammer@eh.at



Jochen Anweiler
j.anweiler@eh.at



Judith Feldner
j.feldner@eh.at



Helmut Liebel
h.liebel@eh.at



Andreas Zellhofer
a.zellhofer@eh.at



Thomas Krach
t.krach@eh.at



Daniel Metz
d.metz@eh.at



Agnieszka Blonska
a.blonska@eh.at



Felix Frommelt
f.frommelt@eh.at



Florian Sagmeister
f.sagmeister@eh.at



Alexander Reiter
a.reiter@eh.at



Lena Dannenmaier
l.dannenmaier@eh.at



William Redl
w.redl@eh.at

The information, opinions and legal views in this article are not intended to be comprehensive and in any case cannot replace an individual examination based on the special circumstances. No liability is accepted for the content of this article.