

Implementation of the UTP Directive in the Austrian Fair Competition Conditions Act

The Federal Act on the Improvement of Local Supply and Competition Conditions (new abbreviated title: "**FWBG**") has been in force since 1 January 2022. The Austrian legislator has thus transposed the UTP Directive¹ into national law by amending the Local Supply Act ("**NVG**"). The main objective of the Directive and the FWBG is to strengthen the position of suppliers in the food supply chain and mitigate the "*fear factor*". All supply agreements within the scope of the FWBG (see below) that are concluded after 1 January 2022 must comply with the new law, whereas existing agreements must be brought into line with the new law by 1 May 2022 at the latest.

Scope of application

The amendment covers agricultural and food products. "Agricultural and food products" are to be understood as follows:

- food, including products made therefrom, and
- products listed in Annex I TFEU (note that in addition to food, certain agricultural products, such as cut flowers or fodder, are also included).

The FWBG addresses B-2-B relationships² in the agricultural and food supply chains. In particular, it applies to relationships where the buyer enjoys

relative market power (*bargaining power*). Section 5a (2) FWBG, adopting the thresholds of Directive (EU) 2019/633, specifies the respective "supplier/buyer" size ratios where such a position is presumed. Noticeably, the Austrian legislator extended the scope and included relationships between suppliers with an annual turnover in excess of EUR 350 million up to EUR 1 billion vis-a-vis buyers with an annual turnover of more than EUR 5 billion.³

As regards commercial matters with a cross-border dimension, the FWBG applies if either the supplier or buyer is established in the EU. In addition, cross-border transactions are also subject to special provisions under Article 6 of the Rome II Regulation, according to which the law applicable to any conflicts resulting from cross-border transactions is the law of the area where competitive relations or the collective interests of consumers are, or are likely to be, affected.⁴

Restricted practices

The FWBG differentiates between "black list" practices (prohibited practices that cannot be waived by the parties, e.g. short-term cancellation, unilateral modification of the contract by the buyer, etc.) and "grey list" practices (such practices may be permitted if explicitly agreed upon, e.g. return of unsold products without payment or demands for payments related to advertising or marketing).

¹ See Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

² Cooperatives are not excluded so long as they produce agricultural products and do not exceed the threshold of EUR 350 million.

³ See section 5a (2) p. 6: https://www.parlament.gv.at/PAKT/VHG/XXVIII/I/01167/fname_1011820.pdf; However, limited in time until December 2025:

https://www.parlament.gv.at/PAKT/VHG/XXVIII/I/01167/fname_1011822.pdf

⁴ See Reg. (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 6 (1): The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

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Importantly, the FWBG goes beyond the UTP Directive as it prohibits any "non-justifiable" discrimination in relation to suppliers. Thus, buyers with bargaining power are not allowed to apply dissimilar conditions to equivalent transactions, and thereby may not discriminate between suppliers if dissimilar conditions (including price and payment terms) cannot be objectively justified⁵.

Furthermore, as direct selling to consumers plays a significant role in the agricultural sector, the FWBG now clarifies that buyers may not demand as a precondition for the conclusion of a contract from suppliers of perishable products (e.g. fruit and vegetables) that they restrict their direct sales to consumers if the delivery of the agreed quantity under the contract is not jeopardised and the restriction cannot be objectively justified in any other way.

Sanctions

Pursuant to Section 6 para 2 FWBG, the Cartel Court may impose a fine of up to EUR 500,000 (per case) at the request of the Federal Competition Authority ("**FCA**"). The provision on fines will enter into force on 1 May 2022. The calculation criteria are essentially derived from cartel law. The possibility of dawn raids, as well as the civil law consequences of nullity, also follow cartel law principles. In addition, an "initial contact point" is to be established at the Ministry of Agriculture from March 2022.

Outlook

In any case, the FWBG is an essential addition to the existing legal portfolio in the retail food and agricultural sector. Apart from the fact that since the beginning of 2022 new contracts must comply with the FWBG, all existing supply agreements must be reviewed (and amended if need be) to ensure compliance with the law by 1 May 2022 at the latest. In addition, the FCA is planning to update its fairness catalogue soon as part of the amendment.

If you have any questions, please do not hesitate to contact us.

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⁵ Annex I to the FWBG, no. 10.