Independent Retail Europe

CROSS-BORDER ENFORCEMENT OF THE UNFAIR TRADING PRACTICES DIRECTIVE

POSITION OF INDEPENDENT RETAIL EUROPE

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POSITION OF INDEPENDENT RETAIL EUROPE – PROPOSAL FOR A REGULATION ON CROSS-BORDER ENFORCEMENT OF THE UNFAIR TRADING PRACTICES DIRECTIVE

Independent Retail Europe takes note of the proposal and concludes after thorough examination that further clarification of certain legal provisions is needed to ensure the regulation does not risk undermining the European single market.

Groups of independent retailers have heavily invested in compliance with the UTP Directive, through the review of thousands of contracts and massive training programmes for their commercial and legal departments. It is therefore in their direct interest that the harmonised rules of the Directive are effectively enforced across Europe, to ensure a level playing field and avoid unfair competition.

Nevertheless, the Commission proposal, which was unusually not subject to any impact assessment, raise important issues:

- Some provisions in articles 5 to 7 risk to undermine the single market and the EU law acquis regulating cross-border contracts if not clarified/amended (articles 5, 6 & 7);
- Legitimate grounds for refusing cooperation are missing from article 10;
- There is a lack of procedural guarantees as to the information that can be exchanged between competent authorities.

1. Some aspects of the cross-border cooperation mechanism risk to undermine legal certainty and the integrity of the single market

A specific difficulty arising from the Commission proposal comes from the fact that the UTP Directive has not been uniformly implemented on a one-to-one basis across Europe. Indeed, many national laws have requirements that go beyond the harmonised basis of the Directive (e.g. adding new prohibitions, or creating specific requirements for negotiations of agricultural products). Moreover, even for the harmonised basis, some Member States have decided to transform practices from the grey list into a black list, when transposing the Directive, while others transposed the grey list literally.

Unfortunately, some the provisions of article 5, 6 and 7 fail to apprehend fully these aspects, and could be used by some national authorities to impose the extra-territoriality of their national laws on contracts and practices which are subject to the laws and jurisdictions of other Member States (due to the applicability of EU and international rules regulating the choice of law and jurisdiction). This would create huge legal uncertainty across the single market for any cross-border purchase of products. Recent cases in some Member States show that this is a very valid concern.

a) Article 5(4) can lead to an imposition of the extra-territoriality of national laws, in breach of existing EU and international law

Article 5 proposes to create a procedure that gives the possibility to a Member State authority to request information from another Member State authority if it suspects that a buyer in the other Member State used an unfair trading practice against a supplier in its own territory.

While article 5 normally applies to practices listed in the UTP Directive, article 5(4) extends the information request mechanism to national laws that are not covered by the UTP Directive. This extension grants the requesting public authority the possibility to obtain information on contracts and practices which are not subject to the laws and jurisdictions of that Member State (as a result of the

application of the Brussels I bis and Rome I Regulations (relating to the law applicable to the contract and competent courts), and conventions), and to use this information to enforce its national law (in breach of EU/international laws on applicable laws and competent jurisdictions).

Concrete example:

Supplier from country A negotiates and concludes a contract with a buyer established in country B. Both parties agree (as per Rome I and Brussels I bis regulations) that the law of country B will apply and that jurisdictions in country B will be competent.

Enforcement authority in country A considers that some aspects of the negotiations/contracts are in breach of provisions of its national UTP laws that are not regulated by the UTP Directive and request information to country B on the basis of article 5(4). The aim of country A is to enforce its national UTP law on the buyer located in country B, even though the contract is subject to the law of country B (as per the Rome I Regulation). Such a situation creates major legal uncertainty and constitutes a new huge barrier to cross-border contracts, undermining the single market.

While the Commission proposal recognises in Article 2(2) that the Regulation does not alter private international law (relating to the applicable law and competent courts), and therefore does not give the right to Member States to enforce their legislation on contracts that legally escape their jurisdiction and legislation, in practice, Article 5(4) allows a Member State to request information, which can then be used to pursue this goal.

In such a case, there are no safeguards, as the Commission proposal does not give the national authority who receives the information request the obligation to refuse the request, neither in article 5 nor in article 10(1) which specify the grounds for refusing information requests. This could severely hinder cross-border buying of food products.

Recommendations for articles 2 and 5(4):

- **Maintain article 2(2),** which is of critical importance to ensure the continuous application of EU/international rules on the applicable law (and jurisdictions) for cross-border contracts and therefore to protect the single market.
- **Delete the second sentence of article 2(1), article 5(4) and recital 4,** in order to preserve the single market and the applicability of EU/International rules on the applicable law and jurisdictions for cross-border contracts. These articles are not necessary to enforce the harmonized basis of the UTP Directive.
- **Alternatively, explicitly state in article 5(4) that the information request mechanism cannot be used by a national authority to request information on contracts which are not subject to its national law** in application of EU/international rules on the applicable law (and competent jurisdictions).

b) Article 5, 6 and 7 do not consider the cases where the grey list of practices of the UTP Directive has not been transposed identically across Europe

The UTP Directive contains two sets of prohibitions: a black list (practices which are prohibited in any circumstances) and a grey list (practices which are prohibited unless they are agreed beforehand in a

clear and unambiguous manner). While the black list is subject to maximum harmonisation, the grey list is subject to minimum harmonisation (as some of the grey practices may bring efficiencies in specific cases). This means that the grey list has not been transposed identically across Europe: some Member States transposed it literally, while others transposed some 'grey listed' practices as 'black listed' practices in national law.

Unfortunately, articles 5, 6 and 7 of the Commission proposal do not foresee explicitly the situation where a public authority used the cooperation mechanism to tackle practices from the grey list which have been transposed differently in another Member State.

Concrete example:

Country A transposed article 3(2)(a) literally in national laws, making it possible to return unsold goods if agreed beforehand in a clear and unambiguous manner (grey list). Country B transposed differently this provision, banning it in every circumstance. Buyer in country A agreed with a seller in country B for a contract that explicitly foresees the return of unsold products in explicitly described and clear circumstances. The parties agreed that the contract is subject to the law of country A. Authority of country B uses article 5, 6 or 7 to request cooperation from country A for a breach of the provision of national laws of country B transposing (more ambitiously) article 3(2) of the UTP Directive.

Given the principle of territoriality of national laws, and the critical importance of preserving legal certainty and the single market, it must be clear that the cooperation mechanism foreseen by article 5, 6 and 7 cannot be used to enforce national laws that go beyond the minimum harmonisation basis (notably when the contract is not subject to the law and jurisdiction of the requesting Member State).

Furthermore, concerning article 7, the Regulation shall not have retroactive effect and exclusively apply to final decisions issued after the Regulation comes into force.

Lastly, the concept of "final decision" in article 7 should be clarified to exclusively cover decisions that are not subject to any legal challenge before a court, and for which all remedies have been unsuccessfully exhausted. Otherwise, the requested authority risks to be forced to enforce a possibly unlawful decision (triggering the liability of the requested authority).

Recommendations for articles 5, 6 and 7:

- ➔ **Clarify that in articles 5, 6 and 7 that these cooperation mechanisms cannot be used to enforce national laws transposing article 3(2) of the UTP Directive that go beyond the harmonisation foreseen by article 3** (in light of applicable EU/international law regulating the applicable law in cross-border contracts).
- ➔ **Clarify the notion of 'final decision' in article 7**. It shall exclusively cover decisions which are not subject to a legal challenge and for which all legal remedies have been unsuccessfully exhausted.
- ➔ **No retroactive effects:** Clarify in article 7 that it exclusively applies to final decisions adopted after entry into force.

2. Article 10 lacks highly legitimate grounds for refusal of cooperation by a requested authority

Article 10 lists the grounds that a requested authority can invoke to refuse to comply with a request for mutual assistance under article 5, 6 or 7. However, there are legitimate grounds that are not listed and which should be added.

For instance, as highlighted above, the requested authority shall be obliged to refuse cooperation when the conduct in question is not unlawful in the country of the requested authority (when this law is applicable to the situation). This is essential to preserve the integrity of the single market and the EU/international acquis on the applicable law and competent jurisdictions for cross-border contracts.

Moreover, the grounds for refusal in article 10(1)(b) and 10(2)(c) should also include administrative proceedings already initiated for the same trade practice (and not only "criminal investigations" or "judicial proceedings" for the same unfair trade practice in the buyer's country). In this case, the requested authority should not only have a right of refusal (which it must first exercise), but the requesting enforcement authority's right to obtain information should not exist at all in these cases.

Furthermore, the conditions for the right of refusal within the meaning of Art. 10(1) are not clearly defined:

- Who decides whether the requested information is "not needed" within the meaning of Art. 10(1)(a)?
- What exactly is meant by "the same" unfair commercial practice within the meaning of Art. 10(1)(b)? This question also arises in the case of a "request for enforcement measures" within the meaning of Art. 10(2).

Recommendations for article 10:

➔ **Add to article 10 an obligation to refuse cooperation when the conduct in question is not unlawful in the country of the requested authority** (i.e. when the law of the requesting country is not applicable).

➔ **Article 10(1)(b) and 10(2)(c) should also cover administrative proceedings already initiated for the same trade practice.**

➔ **Clarify the concept of 'same' unfair commercial practice and who decides when an information request is not needed as per article 10(1)(a).**

3. Article 14 shall not be used to enforce national UTP laws going beyond the harmonised basis of the UTP Directive

The issues raised above also apply to article 14, as to cooperation on national laws that go beyond the harmonised provisions of the UTP Directive. The fact that the grey list of the UTP Directive is not subject to maximum harmonisation and that Member States are entitle to adopt national UTP laws regulating aspects not covered by the UTP Directive shall be taken into account by article 14. Joint coordinated action on non-harmonised matters risk to severely disrupt the single market, putting a strain on the resources of national enforcement authorities for practices that may be perfectly legal in their national laws.

Member States should therefore not be obliged (or shall be able to refuse) to participate in a "coordinated action" within the meaning of Art. 14 if the conduct in question is not unlawful/not a

UTP under their national law. This is all the more important as, so far, there have not been any cross-border issues that have hindered the efficient enforcement of the UTP Directive.

Moreover, the same considerations (mentioned for article 10) apply as to administrative proceedings already initiated for the same trade practice.

Recommendations for article 14:

- ➔ **Provide a right for the requested Member State Authority to refuse to participate in a coordinated action if the alleged conduct is not unlawful in its country.**
- ➔ **Article 14(1)(a) should also cover administrative proceedings already initiated for the same trade practice.**
- ➔ **Clarify the concept of 'same' unfair commercial practice.**

4. A lack of guarantees as to the confidentiality of information and procedural rights

Exchange of (confidential) information always raise risks of leaks, which may have a strong detrimental impact on the legitimate interests of the business operators concerned. It is the prime reason why, in other contexts, EU legislation that mandate information sharing traditionally contain stringent provisions to protect confidentiality of commercial information and trade secrets.

However, the Commission proposal does not foresee any guarantee with regard to the confidentiality of the information obtained through the information requests and mutual assistance mechanism. Moreover, the procedural guarantees seem insufficient for the information request mechanism of article 5, notably in light of other existing information exchange mechanism under EU law.

We therefore call on the co-legislator to introduce a specific article related to the confidentiality of the information exchanged, the preservation of trade secrets and strict rules regulating the possible publication of information when they risk to create unjustified harm to the reputation of business operators.

For instance, a new provision could be added to article 10 (ground to refuse to share information) in cases where the information request would lead to major risks of the publication of trade secrets or would be contrary to public order (similar to the same provisions applicable in article 54 of Regulation 904/2010 on administrative cooperation to combat VAT fraud).

Moreover, specific provisions should be added using the model of article 19(1)(b) and (c) of the recent Data Act which provides procedural guarantees to prevent any unlawful access (notably by asking the requesting public authority to guarantee the requested authority that they have "*implemented technical and organisational measures that preserve the confidentiality and integrity of the requested data (…) and safeguard the rights and freedoms of data subjects*") and that the requesting authority erase the data as soon as they are no longer necessary for the purpose of the request (and inform accordingly the business operators after having erased the data).

Furthermore, article 5 should contain a new obligation for the requested authorities to keep records of all the exchanges between the requesting and requested national authorities when the requested national authority conducts investigations or sends requests for information under the cooperation mechanism. Lastly, requests sent to companies by a requested authority shall explicitly state the subject of the investigation, as well as the identity of the requesting authority that made the request.

Recommendations:

- ➔ **Introduce new confidentiality obligations on authorities making use of the mutual assistance mechanism, using existing precedents under EU law to preserve confidentiality and trade secrets. Article 19(1) of the Data Act and article 54 of Regulation 904/2010 (on administrative cooperation to combat VAT fraud) should serve as a model.**
- ➔ **Introduce in article 5 an obligation on public authorities to keep records of their exchanges.**
- ➔ **Introduce in article 5 an obligation on the requested authority to identify the requesting authority and the subject of the investigation in any information request sent to business operators.**

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Established in 1963, ***Independent Retail Europe*** *(formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.
Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 24 groups and their over 501.000 independent retailers, who manage more than 764.000 sales outlets, with a combined retail turnover of more than 1,411 billion euros and generating a combined wholesale turnover of 621 billion euros. This represents a total employment of more than 6.440.000 persons.

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