



Council of the European Union  
General Secretariat

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**Interinstitutional files:  
2024/0318 (COD)**

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**Brussels, 14 January 2025**

**WK 399/2025 ADD 12**

**LIMITE**

**AGRI  
AGRIORG  
CODEC**

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#### **CONTRIBUTION**

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From:	General Secretariat of the Council
To:	Delegations
N° Cion doc.:	ST 16776 2024 INIT
Subject:	Regulation on cross-border enforcement of unfair trading practices (UTPs) - Comments from Sweden

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**Ministry of Rural Affairs and infrastructure**  
Department for Rural Affairs, Division for Agriculture  
and the Food Production



Swedish comments on Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on cooperation among enforcement authorities responsible for the enforcement of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

Please find the Swedish delegation's first set of written comments on Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on cooperation among enforcement authorities responsible for the enforcement of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

Apart from the comments in this document, Sweden reserves the right to submit further written comments later in the process if we consider it necessary.

**The scope of application**

Regarding to recital 2 and 4 and article 2 of the proposal it is clear that the regulation does not cover the application of national provisions that are stricter than Directive (EU) 2019/633. However, it seems that the mechanism for requesting information even shall be used in those cases if a Member State chooses to allow it. Sweden is one of several Member States that have introduced more stricter national rules. It is therefore important to clarify how the mechanism for mutual assistance should work in practice in cases where stricter national rules apply. Further, it should be clarified how the following part of Article 2.1 should be interpreted: “**in relation to**

**national rules** within the meaning of Article 9 of Directive (EU) 2019/633 if the Member State so decides in accordance with paragraph 4 of that Article”.

#### **Procedure for requests for mutual assistance (Article 9 and 10)**

Sweden notes that the proposal appears to impose a mandatory requirement on the enforcement authorities to assist in request for mutual assistance.

According to the proposal, refusal to comply with a request can only be carried out in certain cases. On a general level, such an arrangement would help to ensure that the enforcement authorities fully cooperate in cross-border investigations. On the other hand, this might entail risks that recurrent, extensive, or imprecise requests for information or supervisory measures could place high demands on the resources of a requested enforcement authority. Based on this, Sweden believes that it should be considered whether proportionality requirements should be introduced in the case of a request for assistance. This is important to avoid excessive administrative burdens.

#### **Investigation and enforcement mechanisms for widespread UTP with a cross-border dimension (Article 13-19)**

The provisions on the investigation of so-called widespread unfair trading practices (Articles 13 to 19) appear to impose mandatory cooperation requirements.

For example, Article 13 states that, in the event of reasonable suspicion of widespread unfair trading practices of a cross-border dimension, the enforcement authorities shall launch a coordinated action based on an agreement between them. This can be interpreted as a coordinated effort must always start when certain criteria are met. The UTP-directive sets out however, that " An enforcement authority might find that there are not sufficient grounds to act on a complaint. Administrative priorities might also lead to such a finding”. Based on this, the enforcement authorities should be able to prioritize which **suspected** cross-border UTPs should be the subject of a coordinated action. Sweden believes that such an opportunity for prioritization should be included in the Regulation.

**Please find more detailed comments below:**

<u>Proposal</u>	<u>SE comments</u>
<p><b>Recital 4:</b> Given that Directive (EU) 2019/633 allows Member States to maintain or introduce stricter national rules against unfair trading practices, it should be clarified that this Regulation does not cover those rules. However, the Regulation should allow the Member States to decide that their enforcement authorities can make use of the possibility to exchange information established under the mutual assistance mechanism set out by this Regulation in relation to such rules. In those cases, the enforcement authorities should still have the right to refuse to comply with such a request.</p>	<p>The way the cooperation mechanisms may or may not be used in Member states with stricter national than the Directive (EU) 2019/633 may require further clarification.</p> <p>For example, the actions of a buyer may relate both to practices specified by the Directive (EU) 2019/633 and by stricter national rules. To be able to make use of the mutual assistance mechanisms or coordinated actions, these would, however, presumably need to be delineated. For example, in the Swedish Unfair Trading Practices Act, no distinction is made between perishable and non-perishable goods with respect to 30-day payment periods. Theoretically, enforcement authorities could investigate alleged unfair trading practices involving both perishable and non-perishable goods, but requests for enforcement measures would only be available in respect of certain of those goods.</p> <p>It can also be noted that the possibility to extend the application of the regulation to stricter national rules only applies for requests for information, but not other mutual assistance. It may be useful to clarify how this difference would work in practice.</p> <p>It may furthermore be useful to clarify what is meant by the possibility to exchange information “in relation to” national rules. As we understand recital 6, enforcement authorities will in any case “have the power to provide one another with and use in evidence in accordance with their national law any matter of fact or of law, including confidential information.”</p>
<p><b>Recital 11:</b> Enforcement authorities should not be entitled to refuse to comply with a request for information or to refuse to participate in enforcement measures unless it is likely that enforcement actions and administrative decisions taken at national level outside the mutual assistance mechanism would ensure cessation of the unfair trading practice with a cross-border dimension. Moreover, enforcement authorities should give reasons for such a refusal.</p>	<p>The grounds for refusal in recital 11 do not entirely match the grounds provided in article 10, which we propose should be addressed in the drafting. For example, recital 11 appears to suggest that a form of assessment should be made of the likelihood of the necessity of the mutual assistance to ensure cessation of the UTP, but this is not reflected in article 10, at least as far as regards enforcement measures. Furthermore, it is not clear whether principles of proportionality (for example an assessment of the suitability and necessity to meet the required end, an assessment of due burden) also need to be considered as part of a request.</p>
<p><b>Article 5 – Requests for information:</b></p>	<p>The scope of article 5 is unclear and should be clarified.</p>

<p>1. At the request of an applicant enforcement authority, a requested enforcement authority shall, without delay, and within 60 days unless otherwise agreed, provide the applicant enforcement authority with the information requested to establish whether an unfair trading practice in the Member State of the applicant enforcement authority with a cross-border dimension has occurred or is occurring.</p> <p>2. The applicant enforcement authority shall, when sending a request for information to the requested enforcement authority, state as legal basis this Regulation, the national law transposing Directive (EU) 2019/633, and the corresponding provisions of Directive (EU) 2019/633, the purpose of the request, and specify what information is required.</p> <p>3. The information provided shall only be collected by the requested enforcement authority and used by the applicant enforcement authority in accordance with their national law.</p> <p>4. Member States may decide that enforcement authorities can make use of the possibilities referred to in this Article in relation to national rules within the meaning of Article 9 of Directive (EU) 2019/633.</p> <p>When an applicant enforcement authority makes use of the possibility provided in subparagraph 1, the requested enforcement authority may refuse to provide information, indicating the reasons for the refusal.</p>	<p>For example, does the article place an obligation of the requested enforcement authority to carry out enforcement measures to obtain the information requested in case the authority does not already possess the requested information, or is it limited to information already in the requested authority's possession? If it is the latter, this could be clarified in the wording of the article. If the requested authority answers that it does not have the information, does this answer account as information itself or does it fall under the scope of article 10 regarding the refusal to cooperate?</p> <p>To the extent that article 5 may require the requested authority to take enforcement measures to obtain the necessary information, what is the distinction between article 5 and article 6, which provides for mutual assistance in enforcement measures, and should articles 5 and 6 be used in conjunction in such situations?</p> <p>Relatedly, would enforcement authorities be empowered to use the powers deriving from Article 6(1) of Directive (EU) 2019/633 in conjunction with an article 5 request (as is the case for an article 6 request), or would further national implementation measures be required?</p> <p>If the requested authority is obliged to take enforcement measures, are requests subject to any requirements in terms of proportionality or reasonableness? Article 5(2) provides the information required in an information request. Additionally, such a request may usefully state why the information request is needed to establish whether a cross-border UTP is occurring, since a lack of need is a ground for refusal according to article 10.</p>
<p><b>Article 6 - Requests for enforcement measures:</b></p> <p>1. At the request and on behalf of an applicant enforcement authority, the requested enforcement authority shall exercise, in accordance with the national rules of its Member State, the powers set out in Article 6(1), first subparagraph, points (a), (b) and (c), of Directive (EU) 2019/633.</p> <p>2. When a requested enforcement authority exercises the powers set out in Article 6(1), first subparagraph, points (a), (b) and (c), of Directive (EU) 2019/633 at the request and on behalf of an applicant enforcement authority, officials and other accompanying persons authorised or appointed by the</p>	<p>By referencing article 6(1)(a) of Directive 2019/633, this appears to imply that an applicant authority can request that a requested authority launch an investigation, and that the requested authority is obliged to comply with such a request. According to article 10, there appears to be limited scope for refusing such a request. It can be questioned if this are corresponding to recital 28 of Directive 2019/633 which provides that enforcement authorities can choose not to act based on administrative priorities (“an enforcement authority might find that there are not sufficient grounds to act on</p>

<p>applicant enforcement authority shall be permitted to attend and assist the requested enforcement authority, under the supervision of the officials of the requested enforcement authority.</p> <p>3. The requested enforcement authority shall inform the applicant enforcement authority about the steps and measures taken and the steps and measures that it intends to take.</p>	<p>a complaint. Administrative priorities might also lead to such a finding”).</p> <p>Article 6(2) refers to Article 6(1), first subparagraph, points (a), (b) and (c), of Directive (EU) 2019/633, which includes the possibility to open investigations, to send request of information to buyers and suppliers, and to carry out unannounced on-site inspections. However, the wording of “attend and assist” appears primarily relevant to unannounced on-site inspections, and appears not to be applicable to the opening of investigations and RFI. The scope of article 6.2 could therefore be clarified. Furthermore, are requests subject to any requirements in terms of proportionality or reasonableness, and should this therefore be spelled out in the text?</p>
<p><b>Article 7 - Requests for the enforcement of decisions imposing fines or other equally effective penalties and interim measures</b></p> <p>1. At the request of an applicant enforcement authority, the requested authority shall enforce, in accordance with its national law, final decisions imposing fines or other equally effective penalties and interim measures adopted in accordance with Article 6(1), first subparagraph, point c, of Directive (EU) 2019/633.</p> <p>2. Paragraph 1 shall apply only to the extent that, after having made reasonable efforts in its own territory, the applicant enforcement authority has ascertained that the buyer against which the fine and the other penalties and interim measures are enforceable does not have sufficient assets in the territory of its Member State.</p> <p>3. The applicant enforcement authority may request only the enforcement of a final decision.</p> <p>4. Questions regarding limitation periods for the enforcement of fines, other equally effective penalties and interim measures shall be governed by the national law of the Member State of the requested authority</p>	<p>It can be noted that article 7 refers to a “requested authority” rather than the defined term of a “requested enforcement authority”. The distinction between the wording should be clarified. It would not appear appropriate for the UTP enforcement authority to necessarily be the relevant requested authority to carry out enforcement of decisions.</p>
<p><b>Article 8 - Notification mechanism:</b> An enforcement authority shall notify all other enforcement authorities within 1 month after adopting a decision establishing the occurrence of an unfair trading practice with a cross-border dimension in its Member State.</p>	<p>The extent of the obligation to notify other enforcement authorities should be further analysed. For example should the European Commission also be informed? In other enforcement areas, such as competition and consumer protection, the European Commission has a coordinating or enforcement role.</p>

<p><b>Article 10 - Refusal to comply with a request for mutual assistance:</b></p> <p>1. A requested enforcement authority may refuse to comply with a request for information under Article 5 only if one or both of the following applies:</p> <p>(a) following a consultation with the applicant enforcement authority, the information requested is not needed by the applicant enforcement authority to establish whether an unfair trading practice with a cross-border dimension has occurred or is occurring;</p> <p>(b) criminal investigations or judicial proceedings have already been initiated against the same buyer in respect of the same unfair trading practice before the authorities in the Member State of the requested enforcement authority or of the applicant enforcement authority.</p> <p>2. A requested enforcement authority may refuse to comply with a request for enforcement measures under Articles 6 and 7 only if, having consulted with the applicant enforcement authority, one or both of the following applies:</p> <p>(a) criminal investigations or judicial proceedings have already been initiated, a judgment has been given, or a court settlement has been reached in respect of the same unfair trade practice before the judicial authorities in the Member State of the requested enforcement authority;</p> <p>(b) the exercise of the necessary enforcement powers has already been initiated, or an administrative decision has already been adopted in respect of the same intra-Union infringement and against the same trader in the Member State of the requested authority in order to bring about the swift and effective cessation of the same unfair trade practice;</p> <p>(c) a criminal investigation or judicial proceedings have already been initiated as regards the same buyer in respect of the same unfair trade practice before the judicial authorities of the applicant;</p> <p>(d) the applicant enforcement authority has not provided the information that is necessary in accordance with Article 5</p>	<p>As noted above, recital 11 provides grounds for the refusal to comply with a request for mutual assistance that differ from the wording of article 10, at least as far as concerns enforcement measures. This should therefore be clarified.</p> <p>Article 10(1)(a) provides that a request may be refused if the information requested is not needed to establish whether an UTP is occurring. It appears unclear how the requested authority will be able to assess in practice whether its cooperation is needed or not. Our understanding is that enforcement measures carried out by the requested authority will be subject to national procedural rules, for example with respect to proportionality and the right to appeal. It may be considered whether the grounds for refusing to comply with a request should therefore take account of the fact that the requested authority cannot comply with a request in a way that is not compliant with national law. As noted above, it is unclear whether requests in themselves are subject to any requirement of proportionality, and if so, this could be spelled out in the text.</p>
<p><b>Article 13 - Launch of a coordinated action and designation of the coordinator:</b></p> <p>1. Where there is a reasonable suspicion that there may be a widespread unfair trading practice with a cross-border dimension, the enforcement authorities concerned by that practice shall launch a coordinated action which shall be based on an agreement between them. The launch of the coordinated action shall be notified to the Commission without delay.</p>	<p>It could be questioned if a automatic triggering of a coordinated action are coherent with recital 28 of Directive (EU) 2019/633, which provides that enforcement authorities can choose not to act based on administrative priorities (“an enforcement authority might find that there are not sufficient grounds to act on a complaint. Administrative priorities might also lead to such a finding”).</p>



2. The enforcement authorities concerned by the widespread unfair trading practice with a cross-border dimension shall designate an enforcement authority to be the coordinator.

3. The enforcement authorities concerned by the widespread unfair trading practice with a cross-border dimension shall conduct investigations on the basis of information that is available to them. They shall notify the results of such investigations to the other enforcement authorities, pursuant to Article 19.

4. An enforcement authority shall join the coordinated action if it becomes apparent during that coordinated action that the enforcement authority is concerned by the widespread unfair trading practice with a cross-border dimension.

5. In order to establish that an enforcement authority is concerned by a widespread unfair trading practice with a cross-border dimension all elements shall be taken into account and in particular:

- a) the Member States where the buyers are established;
- b) the Member States where the suppliers that may be affected by the unfair trading practice are established.

**Article 17 - Cessation of coordinated action**

A coordinated action shall cease if the enforcement authorities concerned by the coordinated action conclude that the widespread unfair trading practice with a crossborder dimension has ceased in all Member States concerned, or that no such widespread unfair trading practice with a cross-border dimension was committed. The coordinator referred to in Article 13(2) shall notify, where applicable, the enforcement authorities of the Member States concerned by the coordinated action of the cessation of the coordinated action without delay.

This article states the grounds for ceasing a coordinated action. Regarding to the intentions of recital 28 of the Directive (EU) 2019/633 a enforcement authorities should also be able to close a case on other grounds.