Black and Grey Lists: New Rules on Trade Practices in Serbia

The new Trade Practices Act for Certain Types of Products (the "Act") introduces two categories of unfair practices, with materially different legal consequences: practices on the Black List are prohibited in all circumstances, whereas practices on the Grey List are presumed to be unfair unless the buyer proves otherwise.

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1. Absolutely and conditionally prohibited trading practices – the black and grey lists

Article 5 of the Act divides unfair trading practices by buyers into practices that are absolutely prohibited and those that are conditionally prohibited. The black list under Article 6 of the Act sets out practices that are prohibited in all circumstances, irrespective of the circumstances of the individual case, the existence of an agreement between the parties, or any commercially justified reason. Accordingly, if a practice falls within the description set out in Article 6, it cannot be upheld or permitted even where it has been incorporated into an agreement between the buyer and the supplier.

The starting point is different for the grey list under Article 7. A practice is deemed unfair unless the buyer proves that the conditions for the relevant exception have been met. All grey-list practices must be clearly, unambiguously, and expressly agreed in writing in advance; however, a standard clause contained in general terms and conditions, or another form of unilateral imposition, is not sufficient.

Black List
The Act provides for a list of 14 trading practices that are prohibited in all circumstances. Among the most commercially significant are agreeing or applying payment periods exceeding 30 days for perishable agricultural and food products, or 60 days for other agricultural and food products; canceling an order for perishable products in its entirety within the statutory period; unilaterally changing the price, quantity, quality standards, deadlines, or other material terms; and requiring payments unrelated to the sale of the supplier's products.

It is prohibited to require the supplier to pay for the deterioration or loss of products occurring on the buyer's premises or after title has passed to the buyer, unless the supplier's negligence or fault caused such deterioration or loss. Likewise, the supplier may not be required to bear the costs of handling consumer complaints where it is not responsible for the cause of the complaint. The black list also includes practices such as requiring compensation or free goods in connection with the expansion or refurbishment of the buyer's retail network; charging for additional quality inspections where the agreed quality has been confirmed; making the supplier's cooperation conditional upon a multilateral set-off arrangement involving the transfer of the buyer's debt to a third party; requiring the supplier to enter into an agreement with, or make payments to, a third party for the purpose of circumventing the Act; and unlawfully acquiring, using or disclosing the supplier's trade secrets.

The Guidelines issued by the Serbian Competition Authority (the "SCA") provide further guidance on the practical application of these prohibitions. For example, a supplier's consent to an amendment, given under pressure to preserve the commercial relationship or out of fear of losing shelf space, does not render the amendment permissible. In assessing such an amendment, the SCA will consider whether there is written evidence of genuine negotiations, and any amendment to the material terms of an agreement must result from mutual consent expressed in writing before the amendment takes effect.

Grey List
As for practices included on the grey list, the Act identifies 15 practices that are presumed to be unfair. In other words, there is a rebuttable presumption that such practices are unfair, and in proceedings before the CPC, the burden of proof lies with the buyer.

These include returning unsold agricultural and food products without payment; charging for ordinary storage; charging for the customary display of products; listing fees and related administrative costs; and passing on to the supplier the costs of sales promotions that the buyer has independently decided to implement.

The grey list also covers charges for advertising and promotional activities independently organised and controlled by the buyer; charges for data relating to sales, turnover or product availability; passing on to the supplier the financial consequences of fines, misdemeanour penalties or administrative measures imposed on the buyer; charging the supplier for the buyer's staff costs; and materially reducing an order or an agreed quantity without a justified reason and prior written notice.

The list further includes unilateral termination of a commercial relationship without written justification and a reasonable notice period; charges relating to reduced turnover; making payment conditional upon payment in goods, services, or other non-cash consideration; retrospective bonuses, incentives, and other charges not agreed in advance; and refusing to accept a perishable agricultural product without appropriate evidence of a defect.

For each of the practices listed above, the Act prescribes specific conditions under which the buyer may rebut the presumption of unfairness.

2. Listing, display, promotions, and returns

Listing: A fee for including a product in the buyer's product range is generally considered unfair. An exception applies where the supplier has requested the listing of a product that is being included in the buyer's range for the first time, and the fee is proportionate and based on actual costs or on objective, reasonable, and predetermined criteria reflecting genuine market value.

Display: Charging a fee for the customary and reasonable display of products at the point of sale is generally considered an unfair trading practice. A charge may be imposed for genuine additional promotional display that goes beyond this standard, provided that the supplier requested such display and the fee is proportionate and based on actual costs or on objective, reasonable, and predetermined criteria that reflect genuine market value.

Promotions: A buyer may not pass on to the supplier the cost of a sales promotion that the buyer has independently decided to implement. Where the supplier has requested the promotion, the buyer must, before the promotion begins, specify its duration and the quantity of products that may be sold at the reduced price.

Returns: Returning unsold agricultural and food products without payment is, as a rule, unfair. The exception is narrow: it applies to a product that the supplier is supplying for the first time, or whose sale was requested by the supplier, provided that the buyer has given a clear prior written warning regarding the risk of slow turnover or the possibility that, due to the product's perishability, its shelf life may expire. The Guidelines require that such a warning relate to the specific product and the specific delivery.

3. Conclusion

For businesses in the supply chain to which the Act applies, the safest approach is to: (i) eliminate black-list practices immediately; and (ii) retain a grey-list practice only where it has been clearly, unambiguously and expressly agreed in writing in advance, all specific statutory requirements are satisfied, and the buyer is able to substantiate compliance with those requirements through appropriate documentation.

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