Germany bans “unfair trading practices”, going further than EU law

Market Report

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NEW ZEALAND FOREIGN AFFAIRS & TRADE Manatū Aorere

Prepared by the New Zealand Embassy Berlin, in consultation with NZTE Berlin

Summary

- Against the backdrop of a high concentration of retail chains and fierce food price competition, Germany is banning several “unfair trading practices”, prohibiting dominant (German) buyers from shifting certain marketing risks and costs to the (German or foreign) supplier.
- The degree to which this will effectively balance the parties’ respective bargaining power in practice remains to be seen, but the new legislation may in some cases potentially have a positive (cascading) effect down to the New Zealand exporter.

Report

German farmers, food processors and importers have for a long time complained about the concentration and bargaining power of retailers in Germany. Four food retail chains make up 85% of the market and are competing heavily with each other, passing on the price pressure to suppliers. The issue has been a highly politicised one, to the extent that farmers have organised rallies against “dumping” and the German Chancellor herself hosted a related stakeholder summit earlier this year. Moreover, the Government has launched a dedicated “You can’t have food for peanuts” campaign.

In this environment, German farmers in particular have placed considerable hope in the European Union (EU)’s Unfair Trading Practices Directive, which aims to protect farmers and smaller suppliers and which member states have had to transpose into national legislation by 1 May this year. With a slight delay, the German Parliament this month adopted the relevant national legislation, going further than the minimum requirements defined by the Directive. The new legislation applies to agriculture and food supply contracts involving at least one EU-based party, from the farm to the shelves.

Germany goes beyond the EU minimum standards and bans further practices

Practices that will be “blacklisted” i.e. banned across the EU include delayed payments for (in particular perishable) agricultural and food products, short-notice cancellations or unilateral contract changes by the buyer, or risks of loss and deterioration transferred to the supplier. In addition, Germany has opted to equally ban further practices included in an EU “grey list” (which, unless banned by national law, remain legal if the buyer and supplier agree), namely the free return of unsold agricultural and food products, and payment of the supplier for storage and (other than first) listing.

Furthermore, where the EU Directive protects suppliers only up to a turnover of €350 million (NZD580 million), Germany will extend this protection to suppliers of dairy, meat, fruit and vegetable products with a turnover of up to €4 billion (NZD6.7 billion) in the relevant sector, mainly to capture larger co-operatives. In any case, the supplier will usually have to be smaller (i.e. weaker) or at least not larger than the buyer, which will certainly be the case when dealing with one of the leading retail chains, but not always further up the value chain. Buyers ignoring the ban of listed practices will face fines of up to €750,000 (NZD1.25 billion). Last but not least, Parliament has asked the Government to establish an independent Ombudsperson (in addition to the government agency tasked to monitor compliance with the law), allowing suppliers within or outside the EU to notify it anonymously of unfair practices or prices. The law foresees a transition period of one year.

Stakeholder reactions have unsurprisingly been mixed. Farmers’ groups have welcomed the extended blacklisting and coverage of larger suppliers, and the food industry commended the move as urgently needed, regretting that larger food processors had not been covered as well. Whilst most farmers will usually not deal with retailers directly, proponents of the new legislation anticipate a cascading effect that will eventually benefit the entire value chain. By contrast, retailers have criticised German legislators for going beyond EU law, effectively interfering into contractual relationships, and fostering increasing consumer prices (which the Government admits may well happen). However, in a Code of Conduct launched earlier this year, retailers had already committed to certain contractual standards, positive marketing (focus on food quality, not price) and strengthened regional supply chains.

What impact to expect, and could New Zealand exporters potentially benefit?

Whilst these reactions indicate that the new legislation will indeed be relevant and make a difference, it has also been suggested that the practices in question are actually not that common or problematic after all, and that the issues for suppliers lie elsewhere. A survey among German food producers about their relationship with the retailers and their practices found that most were actually thinking positively about the retailers they were selling to. Problematic practices most commonly cited included listing fees, discounts to support marketing campaigns or payments to fund advertising. However, only one in five actually viewed those negatively. Instead, the key problem identified was suppliers' perceived lack of bargaining power when it comes to negotiating prices and other key conditions.

Those selected importers of New Zealand meat or fruit consulted on the topic agree that addressing "unfair trading practices" is not a bad thing, but views differ on how relevant or effective the new legislation will be in practice. The sceptics suggested the new law was essentially a paper tiger, since suppliers would simply not dare standing up against retailers, or retailers would find other ways to exploit their bargaining power. More positive voices anticipated that the new legislation could indeed help to reduce the imbalance between different market participants. Retailers would in future need to be more thoughtful about what they could legally ask for from their suppliers, who in return would find it easier to claim fair treatment.

On balance, this new legal development should at the very least do no harm to New Zealand exporters but could in the best case – depending on the sector, the circumstances and the exporter's own bargaining power – be modestly beneficial as it potentially binds German importers, processors, wholesalers and retailers alike. Retail food prices may increase modestly as a result, but from a relatively low level and in a wealthy country, hence impact on overall demand should not be significant.

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