

Legal Alert

Contractual Advantage: New Rules of Agricultural and Food Product Trade

July 2017

The Act of 15 December 2016 on Counteracting Unfair Use of Contractual Advantage in Trade of Agricultural and Food Products came into force and effect on 12 July 2017. The law confers additional powers on the President of the Office of Competition and Consumer Protection but raises many concerns for business operators affected by the new regulations, i.e. suppliers and buyers of agricultural and food products.

The provisions of the Act apply to contracts for acquisition of agricultural and food products between suppliers (e.g. agricultural producers or intermediaries) and buyers (e.g. retail chains, restaurants or processing plants). The Act introduces a general prohibition on unfair use of a contractual advantage in this type of business relationship.

The President of the Office of Competition and Consumer Protection (UOKiK) is empowered to determine if an entity who enjoys a contractual advantage, being a supplier or buyer, as the case may be, has made an unfair use of their advantage. The President of UOKiK has a number of instruments available for use in the proceedings which instruments are known from the Act on Competition and Consumer Protection such as a request for relevant information or inspection at the business operator's premises.

Importantly, the President of UOKiK can issue proceedings on unfair use practices of abusing the contractual advantage if

- (a) the total sales volume between parties to a contract exceeds PLN 50,000 for the year of the proceedings or for either of the 2 years before; and
- (b) the sales of the entity who uses prohibited practices, or of its group of companies as a whole, exceeds PLN 100 million for the year preceding the institution of the proceedings.

Great uncertainty

Although virtually all market players share support of the commendable purpose of the Act, which is to eliminate unfair conduct in the broadly understood agricultural and food industry, translating the letter of the new law into the market practice can be tricky. First of all, it is because of a number of vague notions used in the Act. They include the term "contractual advantage" itself and an open catalogue of practices amounting to unfair use of that advantage, let alone "best practices" or an "overriding interest of the other party", which are crucial to be able to determine if a practice is indeed unfair.

Practical problems caused by the vague language of the Act are further compounded by the fact that the provisions of the Act introduce wholly new concepts to the legal system of Poland. Parties concerned by the Act thus face considerable uncertainty as to how the President of UOKiK will enforce the new laws. However, nothing in the statements made by representatives of the President of UOKiK suggests that any explanations or guidelines providing general interpretation guidance are about to be issued at this time. In response to requests from the affected groups to provide detailed clarifications, the President



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of UOKiK says merely that each case will be assessed individually basing on the case-specific factual circumstances.

Practical implications?

The Act contains an open and very general catalogue of examples of practices that amount to unfair use of a contractual advantage. They include, without limitation:

- unreasonable termination or threatened termination of contract (e.g. forcing new conditions of supplies by threatening to terminate the contract);
- awarding the right to terminate the contract to one party only;
- making the contract or its continuation dependent on other non-contractual consideration (e.g. charging fees for acceptance of goods for sale or fees for reporting sales made or fees for opening a new outlet of the buyer or expenses for product disposal);
- unreasonable extension of payment terms (e.g. contesting an invoice issued for apparently non-existent errors).

In the absence of detailed clarifications by the President of UOKiK, as mentioned above, experiences of other EU Member States that have implemented similar legislation and the position of the European Commission must be referred to in order to identify practices that would be unfair use of a contractual advantage. The most essential examples of such practices include:

- retroactive amendments to the contract;
- unfair transfer of commercial risks (e.g. making the supplier fully responsible and liable for stolen goods);
- imposing an obligation to buy products or services from a third party, without a reasonable cause;
- refusal to provide the name or address of the producer on the product label for private-label products;
- transfer of sanctions imposed by the regulatory authority to the supplier, without proven fault on the part of the supplier;
- unfair and unreasonable penalties for default of the contract;
- exclusion of default interest charges for late payments; or exclusion of debt collection expense recovery;
- demands for the lowest price;
- demands for compensation for costs of opening new outlets;
- demands for compensation for costs of customer claims handling, except where reasonable consumer complaints concern issues attributable to the supplier;
- returns of unsold food products, except poor quality products or new products that are unfamiliar to consumers.

Even though hardly any firm conclusions can be drawn at this time, it seems that it will be exactly these types of practices that would attract sanctions from the President of UOKiK.

Consequences of non-compliance

The primary sanction for unfair use of a contractual advantage is a fine that the President of UOKiK can impose on a business operator. Such a fine can be up to 3% of the total sales (i.e. not the bare profit) of an infringing organisation. Moreover, the decision of the President of UOKiK closing the proceedings will also enjoin the party from using contested practices. Arguably, entities wronged by the conduct of business operators who unfairly abuse their contractual advantage will be inclined to claim damages. A final and enforceable decision of the President of UOKiK can make it much easier for them.