

October 2021

New Act on counteracting the unfair use of contractual advantage

On 1 October 2021, the Lower House of the Polish parliament passed a new Act on counteracting the unfair use of contractual advantage in the trade in agricultural and food products.

The new Act is to replace the currently applicable regulations in this regard, i.e. the Act of 15 December 2016 of the same title. The amendments brought by the new Act are to, inter alia, extend the protection of agricultural producers against entities conducting commercial activity, and also introduce a raft of examples of new prohibited practices related with the use of contractual advantage on the agricultural and food market. The new regulations are now being assessed by the Senate.

The key assumptions of the Act were explored below.

Purpose of the Act

The main purpose of the Act is to introduce the provisions of the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain into the Polish regulatory framework.

The primary assumption thereof is to counteract unfair trading practices that may occur in the food supply chain due significant imbalances in bargaining power between suppliers of agricultural/food products and economically robust, consolidated

processing and distribution sector entities (including large retail chains). Differences in economic potential may lead to the imposition of unfair trading practices by larger players on smaller entities.

This is why, provisions on counteracting the unfair use of contractual advantage seek to prevent entities enjoying such an advantage from using unfair trading practices to exert pressure on the profits and margins of suppliers of agricultural and food products.

Significant disparity in economic potential

One of the key amendments brought about by the Act relates to the list of practices defined by the legislator as examples of "significant disparity in economic potential" in the context of unfair use of contractual advantage.

Pursuant to the new Act, significant disparity in economic potential applies to certain unfair trading practices which occur in relation to sales of agricultural and food products by:

- suppliers which have an annual turnover not exceeding the equivalent of EUR 2 million to buyers which have an annual turnover of more than the equivalent of EUR 2 million;
- suppliers which have an annual turnover of more than the equivalent of EUR 2 million and not exceeding EUR 10 million to buyers which have an annual turnover of more than the equivalent of EUR 10 million;

- suppliers which have an annual turnover of more than the equivalent of EUR 10 million and not exceeding EUR 50 million to buyers which have an annual turnover of more than the equivalent of EUR 50 million;
- suppliers which have an annual turnover of more than the equivalent of EUR 50 million and not exceeding EUR 150 million to buyers which have an annual turnover of more than the equivalent of EUR 150 million;
- suppliers which have an annual turnover of more than the equivalent of EUR 150 million and not exceeding EUR 350 million to buyers which have an annual turnover of more than the equivalent of EUR 350 million;
- suppliers which have an annual turnover not exceeding EUR 350 million to all buyers which are public authorities under the Act on public procurement.

The Act also contains an analogous catalogue of instances of significant disparity in economic potential in practices imposed by the supplier on the buyer, based on turnover thresholds.

In this context, the annual turnover shall mean the turnover obtained in a year preceding the year in which the practice that may serve as a basis for initiating the proceedings occurred (and not the year in which the proceedings are initiated, as indicated by the current wording of the Act).

Prohibited practices

The new Act provides for important extension and clarification of regulations on unfair trading practices related to the use of contractual advantage, pointing to seventeen types thereof. The currently applicable Act does not contain such a detailed list and only generally refers to what the unfair use of advantage may consist of. Importantly, the list provided by the new Act is not exhaustive.

Pursuant to the new Act, unfair trading practices related to contractual advantage, include, inter alia:

1. delay in payment for the received products (more than 30 days for perishable agricultural and food products or more than 60 days for other agricultural and food products);
2. cancellation by the buyer of orders of agricultural and food products that by their nature or at their stage of processing are liable to become unfit for sale within 30 days after harvest, production or processing, less than 30 days before the expected delivery date;
3. unilateral changes to the terms of a supply agreement by the buyer;
4. lowering the amount due for the delivery of products after their acceptance by the buyer in full or in the agreed part, in particular as a result of a request for a discount;
5. setting dates of payment for delivered agricultural or food products in violation of the provisions of the Act on counteracting excessive payment delays in commercial transactions;
6. demanding payments non-related to the sales of products from the supplier by the buyer;

7. requiring the supplier to pay for the deterioration or loss, or both, of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier;
8. the buyer's refusal to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation;
9. the buyer's unlawful use, acquisition, or disclosure of the trade secrets of the supplier;
10. the buyer's threats to carry out or actual performance of acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights;
11. the buyer's demand for compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier;
12. the buyer's return of unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products;
13. charging the supplier with a payment as a condition for stocking, displaying, or listing its agricultural and food products, or of making such products available on the market;
14. requiring the supplier to bear all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion;
15. requiring the supplier to pay for the advertising of agricultural and food products;
16. requiring the supplier to pay for the marketing by the buyer of agricultural and food products;
17. charging the supplier for staff for fitting-out premises used for the sale of the supplier's products.

The practices presented in points 1-11 are to be prohibited, while practices indicated in points 12-17 are to be permitted, on the condition that they have been previously agreed in clear and unambiguous terms in the supply agreement and the pursue thereof will not be treated by the parties as unfair use of the contractual advantage.

Fines and new powers of OCCP President

Importantly, the Act delegates new powers to the President of the Polish Office of Competition and Consumer Protection (OCCP). It brings the possibility for the President of OCCP to provide a significant view relevant to the case related to civil law claims associated with the use by suppliers against buyers or by buyers against suppliers of practices that may constitute unfair use of contractual advantage, provided that it lies in the public interest.

Moreover, the President of OCCP is to become authorized to issue decisions, including decisions to refrain from certain actions in order to prevent damage to the supplier or the buyer. It will be possible in a situation where, in the course of proceedings concerning practices of unfair use of contractual advantage, it is probable that the continued use of the unfair practice may cause damage to the supplier or the buyer, which will be serious and difficult to remove.

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Furthermore, the Act introduces the possibility of voluntary submission to a penalty by a party, if the President of OCCP decides that it will accelerate the proceedings. In such a case, the fine may be reduced by no more than 50 percent in relation to the penalty that would have been imposed if the party had not voluntarily submitted to it.

Finally, the Act brings about new regulations with regard to the amount of the fine, in a situation where the entity did not generate any turnover or achieved a turnover not exceeding the equivalent of EUR 100 thousand in the financial year preceding the penalty year. If the entity has not achieved such turnover, the President of OCCP will take into account the average turnover achieved by the entrepreneur

in the three consecutive financial years preceding the year in which the fine was imposed. On the other hand, if the entity has not achieved turnover in a three-year period, or if the OCCP will have the right to impose a fine in the amount not exceeding the equivalent of EUR 10 thousand.

If you would like to learn more about the issue discussed, please do not hesitate to contact us.

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