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Poland: Regulation on unfair contractual practices in the food retail sector – An answer to inefficient private enforcement or an example of good regulation?

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ABSTRACT

The article focuses on relatively new law in Poland aimed at elimination of unfair commercial practices in relations between undertakings in the agricultural and food products supply chain, thus at protection of weaker players - farmers and small suppliers. The Act on counteracting the unfair use of contractual advantage in the trade in agricultural and food products specifies a basis for the public enforcement of the prohibition against such practices and provides for possibility of imposition of relatively high fines. The article introduces the background of the introduction of the Act, the scope of its provisions and briefly analyses reported decisions of the President of the Office of Competition and Consumer Protection (UOKiK) issued during more than two years after the Act entered into force. In most cases, undertakings voluntarily undertook to promptly change their practices and improve the situation of their contractors, and in this way avoiding financial penalties. However, the first fine in the highest possible amount was recently imposed. The President of UOKiK is still conducting seven proceedings.

L'article se concentre sur une loi contre l'utilisation déloyale des avantages contractuels dans le commerce des produits agricoles et alimentaires – relativement nouvelle en Pologne. Cette loi vise à éliminer les pratiques commerciales déloyales entre les entreprises de la chaîne d'approvisionnement des produits agricoles et alimentaires. Elle a pour but de protéger les agriculteurs et les petits fournisseurs. Cette loi précise l'interdiction de telles pratiques et prévoit la possibilité d'imposer des amendes relativement élevées. L'article présente le contexte de l'introduction de cette loi, la portée de ses dispositions et analyse brièvement les décisions rendues par le président de l'Office de la concurrence et de la protection des consommateurs (UOKiK), rendues pendant la période de deux ans d'application de la loi. Dans la plupart des cas, les entreprises se sont engagées volontairement à modifier rapidement leur comportement et à améliorer la situation de leurs contractants, évitant ainsi les sanctions financières. Cependant, une première amende d'un montant maximale a récemment été infligée. Le président du UOKiK a sept autres procédures en cours.

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Introduction

1. The Polish Act on counteracting the unfair use of contractual advantage in the trade in agricultural and food products entered into force on 12 July 2017¹ (hereinafter the “Act”). Its main goal is to eliminate unfair commercial practices in relations between undertakings in the agricultural and food products supply chain. Its ultimate goal is to protect weaker players—farmers and small suppliers. The Act provides a basis for the public enforcement of the prohibition against such practices and imposes relatively high fines.

2. During more than two years after the Act entered into force, the president of the Office of Competition and Consumer Protection (UOKiK) issued six decisions on its basis. In most cases, undertakings voluntarily undertook to promptly change their practices and improve the situation of their contractors, and in this way avoiding financial penalties. The first fine in the highest possible amount was already imposed.² However, the president of UOKiK is still conducting seven proceedings.

1 OJ 2019.517. Unified text from 19.3.2019.

2 Decision of the President of UOKiK, 01.10.2019, RBG-15/2019.

3. According to the declaration of the president of UOKiK, the grace period³ has already come to an end. Undertakings must be aware that the regulator will no longer follow a lax approach towards those who use their contractual advantage, harming the interests of weaker market participants. The changes in the Act also support these declarations. As a result of the amendment to the Act introduced in November 2018,⁴ the competences of the president of UOKiK were extended. The amendment abolished the thresholds of application of the Act, which determined the possibility of intervention of the president of UOKiK. These were based on the criterion of turnover between the supplier and the buyer (PLN 50 thousand per year), and the turnover of the entity violating the provisions of the Act (minimum PLN 100 million per year). As a consequence, UOKiK may intervene in virtually any case. The literature on the Act is not abundant but discusses specific provisions of the Act mainly from practical perspective.⁵

4. Below we analyze the background of the introduction of the Act, its material and procedural scope, and the decisional practice of the president of UOKiK since its entry into force.

I. Background of the introduction of the Act

1. Reasons for the introduction of the new system

5. According to the justification for the bill (hereinafter the “Justification”),⁶ the aim of the Act is to eliminate the use of unfair commercial practices from the supply chain of agricultural raw materials and food in the light of the necessity of ensuring the country’s food security. Further, buyers’ pressure on suppliers including by means of price may result in restrictions on production or its total abandonment. Subsequently, forcing low prices on suppliers may cause agricultural producers and processors to substitute good quality raw materials

with inferior raw materials in the production process, to apply cheaper (and thus inferior) chemicals used for the preservation and coloring, or to use cheaper food production technologies. The drafters of the Act made an assumption that unfair practices are a means of getting the lowest price for the buyer, which in turn results in lowering the quality of the food offered to the consumer.

6. The Act applies only to suppliers of agricultural and food products due to the special character of the agri-food industry based on the production of goods that have a specific expiry date. This in turn imposes on producers and food processors the necessity to sell their goods in a relatively short time. This pressure means that they often have to agree to particularly unfavorable conditions offered by buyers in order to ensure even minimal funds for further functioning of their farm or small enterprise. The structure of the agri-food market makes it particularly susceptible to unfair practices, i.e., behaviors that grossly deviate from good commercial conduct and are contrary to the principle of good faith and fair trading, and are unilaterally applied by one trading partner towards its counterpart.

7. The Justification made a reference to the opinion of many suppliers of agricultural and food products, though did not refer to any specific survey. Accordingly, it is a common practice for buyers including large-format stores, to force unequal contract terms in contracts with their suppliers. The catalogue of such terms is very broad, ranging from imposing contract templates without the possibility of negotiating their content, the unilateral termination of contracts, forcing the level of purchase prices, and extending the payment deadlines for delivered goods, up to forcing additional non-equivalent services, which take various forms and names. This is especially true for practices used by large-surface trade. These include marketing fees such as fees for display and sales space, for advertising services, for conducting an occasional campaign, for providing information on the sale of products in individual retail outlets, for opening a new outlet for the buyer, for non-returns of products, for the utilization costs of products, conditional or unconditional fees, logistics fees, fees for the electronic exchange of commercial or financial documents and discounts to published catalogues, shopping discounts or promotional discounts.

8. Also, the Justification indicates cases of suppliers of agricultural raw materials or food terminating previously concluded contracts with recipients of their products as they receive a more favorable price offer from another buyer, or make the conclusion of a contract subject to other services. In addition, according to the Justification, suppliers refrain from suing the retail chains throughout the duration of their contracts as they had to face retaliation from a large retail chain in the form of termination of cooperation. For this reason, suppliers usually only put forward claims after the contract has expired. In the situation of economic dependence of suppliers on retail chains, suppliers usually do not want to risk losing the contract if they are connected with recipients by long-term cooperation agreements.

3 <https://edgp.gazetaprawna.pl/e-wydanie/56920,4-pazdziernika-2019/69479,Tygodnik-Gazeta-Prawna/704426,Prezes-UOKiK:-koniec-poblatliwosci-takze-dla-sieci-handlowych.-Teraz-pora-na-kary.html>, https://www.uokik.gov.pl/aktualnosci.php?news_id=15813.

4 OJ 2018.2203.

5 K. Kohutek, Ustawa o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi. Komentarz [online]. System Informacji Prawnej LEX. Z. Pinkalski, Podmiotowy zakres zastosowania ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi - analiza krytyczna, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego*, 2018, No. 4, pp. 123–132. M. Namysłowska, A. Piszcz (ed.), *Ustawa o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi. Komentarz*, Warszawa 2017.

6 <https://legislacja.rcl.gov.pl/projekt/12321951/katalog/12598559#12598559>.

9. According to the Justification, in those situations the stronger party shifts its economic risk to the other party, which causes a deterioration in the financial condition of food producers. This results in the need to reduce the prices paid by these companies to agricultural producers for the raw materials supplied.

10. The Justification also indicates that existing legal instruments in Poland are not widely used due to their private character, high costs and long duration of proceedings before courts.

11. Finally, the Justification indicates that the problem of imbalance among participants in the food supply chain exists not only in Poland, but in most European Union countries. One of the reasons for this situation is the strong economic consolidation among entities in the distribution sector, on the one hand, and the strong fragmentation between undertakings producing agricultural raw materials and food products on the other. The Justification refers to the Report of the Commission addressed to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain,⁷ and indicates that many Member States already took some independent actions to improve relationships between entities in the food supply chain. The Justification also directly refers to the lack of activity on the part of the European Commission, which does not currently see any justification for a Union-level regulation of relations between actors in the food supply chain. However, in April 2019, the Directive of the European Parliament and of the Council on unfair business-to-business commercial practices in the supply chain of agricultural products and foodstuffs was adopted.⁸

II. Analysis of the Act's substantive rules

1. Scope of the Act

12. The Act applies only to the agri-food market, excluding the direct supply of small quantities of raw materials to the consumer or a local retail establishment directly supplying the consumer (e.g., the farmer's sale of a small amount of agricultural produce at the market).

13. Agricultural and food products should be understood as articles intended for human consumption, which includes: processed (e.g., canned goods, jams, sausages,

sugar), partially processed (e.g., raw products resulting from the slaughter and cutting of raw roast beef or pork half-carasses), and unprocessed products (e.g., fresh vegetables, fruit, meat).

14. The Act defines the notions of supplier and buyer. They are formulated very broadly and cover a wide spectrum of contracts. During the drafting of the Act, the buyer was most often referred to as, e.g., a large commercial chain using its contractual advantage over the supplier. Currently, however, the Act indicates that the supplier may also use the contractual advantage over the buyer.

15. Agricultural and food products do not include, among others, animal feed, tobacco and plants before harvesting. The scope of the Act does not include direct deliveries within the meaning of the provisions on food safety and nutrition, as they relate to small quantities of raw materials supplied by the producer to the final consumer or local retail establishment directly supplying the final consumer. This exclusion is justified by the scale, type and nature of direct deliveries.

2. Public interest

16. UOKiK initiates proceedings only to protect the public interest. Specific behavior harms the public interest if it affects a wider range of actors or has negative effects on competition and consumers. In examining the case, UOKiK considers whether and how the undertaking's behavior will affect competition and what effect it may have on consumers, and whether the undertaking's behavior may have adverse effects on the market via its impact on the quantity, quality, price of goods or the range of choice available to consumers or other buyers.

3. The interest of the weaker party

17. The Act does not define what the interest of the weaker party means. However, it determines which behaviors may violate this interest and will be considered as an abuse of contractual advantage. It applies, among others, to unjustified termination of a contract or threat of termination, granting only one party the right to terminate the contract, to withdraw from it or to terminate it, making the conclusion or continuation of a contract subject to the acceptance or performance by one of the parties of another benefit which has no material or customary relationship with the subject of the contract, or the unjustified extension of payment deadlines for delivered agricultural or food products, in particular in violation of the provisions of the Act of 8 March 2013 on preventing excessive delays in commercial transactions— from 1 January 2020.⁹

⁷ COM/2016/032 final.

⁸ 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, PE/4/2019/REV/2, OJ L 111, 25.4.2019, pp. 59–72.

⁹ OJ 2019.118. Unified text from 21.1.2019.

4. Significant disproportion in economic potential

18. Even before the Act entered into force, questions arose as to how to understand the notion of significant disproportion in economic potential, which is one of the premises for the occurrence of contractual advantage. The Act does not define this concept by means of explicit quantitative criteria. UOKiK announced at meetings prior to the entry into force of the Act that each case would be considered and assessed separately.

5. Good morals

19. Another term that appears in the description of the situation when the president of UOKiK will take action is a reference to good morals. These are extralegal moral and customary norms. They set standards for the entrepreneur's honest behavior by referring to values commonly respected in business transactions. The assessment of whether a given entrepreneur's practice is contrary to morality will require reference to the circumstances of the case (specific facts).

6. Taking advantage of the weaker party to the contract

20. The contractual advantage may occur on both the supplier's and the buyer's side. This term is understood to mean a significant disproportion in the buyer's economic potential relative to the supplier or vice versa.

21. In the original wording of the Act, it was also necessary to demonstrate that the buyer or supplier does not have sufficient and actual possibilities to sell agricultural or food products to other buyers in order to establish contractual advantage. As a result of the amendment, this premise was abandoned.

22. The Act prohibits the unfair use of contractual advantage. It should be noted that merely having a contractual advantage is not prohibited. It is prohibited to use it fraudulently. The contractual advantage is used unfairly if it is contrary to good morals and threatens the essential interests of the other party or violates such interests.¹⁰

23. Determining whether there has been a fraudulent use of contractual advantage will be done by assessing the entrepreneur's actions in terms of meeting the above-mentioned conditions, which must be met jointly.

¹⁰ Art. 7(2), the Act.

7. Open catalogue of practices

24. The Act lists four examples of situations considered as unfair.¹¹ The list is not closed and other unfair market practices may also be subject to UOKiK's assessment. The Justification indicates that the introduction of a closed list of practices in the Act could lead to the situation in which the Act could become ineffective shortly after its entry into force. It was emphasized in the Justification that countries that had already introduced regulations containing a detailed list of dishonest behaviors had had bad experiences due to the "great creativity" of entrepreneurs who were introducing new practices in their contractual relationships—not covered by the list specified in the regulations—in order to achieve additional benefits.

25. It should be emphasized, however, that the Act does not prohibit the provision of promotional, marketing or logistics services by networks. Nevertheless, it is not allowed to unfairly use the contractual advantage by collecting excessive remuneration for services rendered, forcing the purchase of such services, e.g., by making the acceptance of goods for sale or the provision of services conditional upon the purchase of such an additional service.

26. The Act does not apply to the use of after-sales rebates—they are therefore allowed. However, just like services, they can potentially be considered unfair if they are contrary to good morals and threaten the essential interest of the other party or violate such interest.

27. Each case examined by the president of UOKiK should be assessed individually. The president of UOKiK takes into account the factual and legal status of a particular case.

8. Fines

28. The fine for abusing the contractual advantage (even unintentional) may amount up to maximum 3% of the undertaking's turnover achieved in the financial year preceding the year of its imposition. The fine, calculated on the basis of turnover, not on profit, is to act as a deterrent. The proceedings may also end without a financial penalty or the president of UOKiK may waive the penalty if the entrepreneur voluntarily undertakes to stop the unlawful practices or to remedy their effects. High penalties are meant to deter undertakings from violating the provisions of the Act.

29. Moreover, if the undertaking, even unintentionally, fails to provide the information requested by the president of UOKiK, or provides false or misleading information, or prevents or impedes the start or conduct of an inspection, the president of UOKiK may impose a fine of up to EUR 50 million. In the case of a delay in the implementation of a decision or court judgment,

¹¹ Art. 7(3), the Act.

for each day of such a delay in cases involving practices concerning the unfair use of contractual advantage, the president of UOKiK may impose a fine of up to EUR 10,000. A fine may also be imposed on a person holding a managerial function or being a part of the entrepreneur's management body, if that person has intentionally or unintentionally failed to comply with decisions, orders or judgments, or prevents or hinders the start or conduct of inspections. Such a sanction may amount up to fifty times the average monthly remuneration announced by the president of the Central Statistical Office.

30. The president of UOKiK may also impose a penalty of the same amount on a person who, while representing the undertaking during the inspection, provided the authority with false or misleading information or prevented or hindered the start or conduct of the inspection. The same applies to a person who is an employee of the controlled entity who prevented or hindered the presentation of documents during the activities of the authority.

31. Finally, the president of UOKiK may impose a fine of up to PLN 5,000 on a witness for an unjustified refusal to testify or an unjustified failure to appear, and on an expert witness for an unjustified refusal to submit an opinion, an unjustified delay in submitting an opinion or an unjustified failure to appear.

III. Procedure before UOKiK

1. The competences of the president of UOKiK

32. The Act indicates that the president of UOKiK is the competent authority in matters of practices involving the unfair use of contractual advantage. Tasks arising from the Act will be implemented by the president of UOKiK by applying the provisions of the Act of 16 February 2007 on competition and consumer protection (hereinafter the "Competition Act").¹² UOKiK's activities will aim at the elimination of unfair practices from business transactions. Importantly, the authority will not be involved in protecting the private interest of a specific entrepreneur.

33. The proceedings before UOKiK in the event of suspected fraudulent use of contractual advantage will be similar to proceedings in the field of anti-competitive practices.

34. The provisions concerning the unfair use of contractual advantage duplicate the procedural solutions contained in the Competition Act. With regard to the provisions determining the types of proceedings, their

¹² OJ 2019.369. Unified text from 26.2.2019.

parties, the powers of the authority conducting the proceedings, the rights and obligations of the parties to the proceedings and controlled entities, the relevant provisions of the Competition Act have been copied to the Act with an unchanged wording.¹³ However, as regards procedural regulations of a technical nature, the Act contains references to the Competition Act.¹⁴

2. Institution of proceedings

35. In spite of the fact that the president of UOKiK institutes proceedings *ex officio*, it is possible to submit a notification regarding the application of practices concerning the unfair use of contractual advantage. It may be reported to the president of UOKiK by any entrepreneur who suspects to be the target of such practices, without restrictions as to the economic potential. In case the proceedings are instituted, the identification of the notifier can be protected.

36. Importantly, as a result of the amendment to the Act of November 2018, the catalogue of entities that can submit notifications in cases of the unfair use of contractual advantage has been expanded. Nevertheless, the notification should include a description of the use of such practices by the entity indicated by the notifying entity.

37. Finally, proceedings regarding the unfair use of contractual advantage shall not be initiated if two years have passed since the end of the year in which they were discontinued.¹⁵

3. Explanatory phase

38. The next stage may be the explanatory proceedings—UOKiK may take them before initiating the proper proceedings. The purpose of the investigation is to determine initially whether there has been an infringement. Explanatory proceedings should last no more than four months, and in particularly complex cases no more than five months.

4. Proceedings

39. During proceedings, UOKiK should investigate available evidence in order to determine whether it should fine an undertaking for the unfair use of contractual advantage. This procedure cannot last longer than five months. Throughout its duration, UOKiK may carry out an inspection at the undertaking's premises. Proceedings will end by issuing a decision declaring the practice to constitute an unfair use of contractual advantage, ordering its abandonment and possibly imposing a financial penalty, discontinuation of

¹³ Art. 12–14, 16(1) and (2), Art. 17–19, the Act.

¹⁴ Art. 15, 16(3), 17(4), 20, the Act.

¹⁵ Art. 32(1), the Act.

proceedings and thus waiving the imposition of a fine, or issuing a commitment decision—in this case, through consultations with the entrepreneur, UOKiK obliges the entrepreneur to meet certain conditions, indicating the deadline for their implementation, without imposing a fine.

5. Appeal proceedings

40. The undertaking has the right to appeal against the decision of the president of UOKiK to the Court of Competition and Consumer Protection (CCCP) within a month from the day the decision was served on the undertaking. The appeal is submitted via UOKiK, which may, if necessary, carry out additional activities to clarify the allegations. Then, the authority may repeal or change the decision or refer the case to the CCCP no later than within three months from the date the appeal has been filed.

6. Private enforcement

41. It should be emphasized that administrative proceedings will not exclude the possibility for the entrepreneurs to file civil claims in court, all the more so as the objectives of these two types of proceedings are different.

IV. UOKiK's decisional practice on the matter

42. The entry into force of the Act caused great market interest. In 2017 alone, UOKiK received 19 notifications from entrepreneurs, conducted 10 explanatory proceedings and 4 inspections. Full data for 2018 has not yet been published.

43. Since the entry into force of the Act, the president of UOKiK has focused on the milk, fruit and vegetable markets. As it results from the reports published by the president of UOKiK,¹⁶ the abuse of contractual advantage consists primarily in setting excessive payment terms and unclear rules for shaping the purchase prices of milk, fruits and vegetables. In addition, in the case of the milk market there are unclear exclusive supply clauses with high penalties for breaching them. On the one hand, agricultural producers are obliged to sell the entire production to the processor, and on the other, maximum quantities of contracted milk are specified. This means that the producer cannot sell the surplus to another processor.

44. From the statements made by director of the UOKiK Branch Office in Bydgoszcz which is charged with prevention of unfair contractual practices, it appears that UOKiK's activities also concerned the issue of imposing charges on retailers by suppliers for using the purchasing platform—but so far no further information on this topic is available.

45. Below, we analyze the decisions that have been issued by the president of UOKiK up to now.

1. Cykoria S.A.

46. The first decision based on the provisions of the Act was issued by the president of UOKiK in February 2018.¹⁷ Cykoria is a producer of food concentrates, dried fruits and spices. UOKiK initiated proceedings against the entrepreneur on 15 February 2018—after complaints from farmers. The regulator contested several provisions in contracts with carrot suppliers. The first of these concerned the lack of specifying of the dates of carrots collection. The company agreed with suppliers that it would buy carrots from them until the end of March of the following year, and that it would inform them about the date and place of delivery only three days in advance. Furthermore, some of them could wait all winter for the call for delivery, risking the loss of a part of the harvest or rejection of the carrots by the recipient due to a reduction in quality. The extension of the payment deadlines also raised UOKiK's doubts. Pursuant to the law, the parties may set a time for payment longer than thirty days, but it should not exceed sixty days. Meanwhile, the company stated that it would pay farmers within sixty days, but this time was counted not from the delivery of the product or invoice, but from the end of the month in which the product was received. This means that in some cases suppliers could wait for money for up to about three months. The last instance of using the contractual advantage may have been the imposition of obligation on farmers to deduct part of their remuneration as a contribution to the Union of Producers of Industrial Chicory and Vegetables.

47. The next day after the initiation of the proceeding, the company undertook to change the questioned practices. Cykoria undertook to shorten the purchase period for carrots by two months and guarantee the receipt of 85% of raw material until the end of the year in which the purchase began. In addition, farmers would deliver the product each month in proportion to the entire agreed quantity (several percent each month). Delivery deadline would also be extended—from three to seven days, and Cykoria would inform about the next date during delivery. This was to reduce the risk of farmers losing crops and make it easier for them to organize their work. The company is to pay its contractors within forty-five days of delivery or receipt of invoice. In addition, farmers would no longer have to deduct contributions to their chicory industry association from their remuneration.

16 https://www.uokik.gov.pl/aktualnosci.php?news_id=15642.

17 Decision of 5.3.2018, RBG-3/2018, https://www.uokik.gov.pl/aktualnosci.php?news_id=14103&news_page=1.

2. Südzucker Polska

48. UOKiK also conducted proceedings against Südzucker Polska—one of four sugar producers in Poland.¹⁸ This company operates in the south of the country, where its competitors do not have their facilities. The proceedings were initiated in connection with complaints regarding the standard contract template used by Südzucker Polska made by farmers, who pointed out irregularities in the company's contracts. UOKiK examined the trade relations of Südzucker Polska and eight randomly selected farmers who in recent years had been supplying beets for more than PLN 50,000.

49. Contract analysis showed that the entrepreneur could use its negotiating advantage over sugar beet suppliers. The UOKiK's doubts were caused by unclear pricing rules and too long payment periods. In the first case, farmers knew only part of the rate they would receive—the so-called guaranteed price—the rest was determined on imprecise terms—it depended primarily on the price obtained in the future from the sale of sugar. Consequently, the farmers did not know the final price. In addition, they could not verify the reliability of the calculations carried out by Südzucker Polska.

50. The regulator also questioned the payment terms used by the company. The sugar producer proposed two deadlines. Farmers who delivered the product by November 30 received payment of the guaranteed price by December 10. However, this was disadvantageous for farmers who supplied beets earlier, e.g., as part of early deliveries in mid-September. Farmers who supplied vegetables from December 1 were even worse off. The contract stipulated that they would receive payment after the sugar campaign was completed, i.e., until the sugar beet was processed. This meant that they could wait more than two months for the money.

51. During the proceedings, Südzucker Polska voluntarily undertook to change practices. UOKiK therefore decided that it would be possible to improve the situation of farmers and quickly eliminate practices that are unfavorable to them.

3. Döhler sp. z o.o.

52. Further proceedings regarding practices concerning the unfair use of contractual advantage were initiated on 10 August 2018 against Döhler sp. z o.o.¹⁹ In Poland, Döhler²⁰ conducts processing activities, in four plants located in the region, of apple and other fruit

18 Decision of 26.4.2019, RGB-7/2016, https://www.uokik.gov.pl/aktualnosci.php?news_id=14532.

19 Decision of 20.5.2019, RGB-9/2019, https://www.uokik.gov.pl/aktualnosci.php?news_id=15499.

20 Döhler sp. z o.o. is a part of the European capital group belonging to the company Döhler Neuenkirchen GmbH (Germany) and one of the largest entities purchasing industrial apples, soft fruits, and producing apple concentrate in Poland.

production, which means that the contractual terms offered by the company and its practice of dealing with contractors have a large impact on market standards. The first of the allegations raised by the president of UOKiK concerned the use by Döhler of a ninety-day payment period for purchased fruit, while Polish law allows for payments within sixty days as a standard, which results from the provisions of the Act on payment deadlines in commercial transactions.

53. The second plea related to the price determination process. Price calculation by Döhler was based on many factors, including supply volumes, weather conditions and maintaining competition. These are circumstances that cannot be predicted when signing contracts many months before delivery.

54. During the proceedings, Döhler voluntarily undertook to change practices. UOKiK considered that accepting this commitment would be best for farmers' interests. The commitment applies to both the undertaking and his subsidiaries.

4. Real S.A.

55. Other proceedings regarding practices unfairly using the contractual advantage initiated on the fruit market were against the company Real S.A.²¹ Its activity involves predominantly a production of frozen food, fruit processing and fruit concentrate. Real S.A. is one of the largest entities purchasing industrial apples, soft fruits and producing frozen fruits and vegetables in Poland. The entrepreneur has two plants producing fruit concentrate and four cold stores. The president of UOKiK, as in other proceedings, charged the company Real S.A. with the use of a long, maximum six-month payment period in contracts concluded with suppliers. In addition to setting a long payment period, there were delays also in the implementation of payments for purchased fruit. The delay in payments to suppliers exceeded 170 days.

56. In this case, Real undertook to change its practice by significantly reducing payment terms and settling arrears with interest to fruit producers. In addition, the company accepted to audit the payment of all fruit deliveries and to check whether payment deadlines or nonpayment were not exceeded.

5. Rauch Polska sp. z o.o.

57. Allegations of unfair use of contractual advantage have also been brought against the fruit concentrate producer Rauch Polska sp. z o.o.²² In addition to juice production, the company deals with fruit processing and the production of semi-finished fruit products, in particular fruit concentrate, as well as the production of packaging for juices and drinks. Rauch Polska has four

21 Decision of 22.7.2019, RGB-11/2019.

22 Decision of 30.9.2019, RGB-14/2019.

production plants. The president of UOKiK argued that Rauch had specified the price in the contractual contracts in a vague manner, giving an imprecise way of calculating it, which cannot be applied in practice. The second charge concerned exceeding the payment deadlines for the fruit delivered. Delays in payments were up to 119 days.

58. During the proceedings, Rauch Polska cooperated with UOKiK and undertook to change the practices in question. UOKiK decided that the proposed actions would improve the situation of farmers, therefore it accepted the company's proposal.

6. T.B. Fruit Polska SKA

59. This case is the first one in which a financial penalty set at the maximum amount was imposed on an undertaking for abusing the contractual advantage.²³

60. The company's main activity is the production of apple concentrate.²⁴ T.B. Group Fruit also produces NFC juices, aromas and frozen foods. Apart from apples, it processes cherries, chokeberries, strawberries, blackcurrants, blueberries and raspberries. It has two production plants. In this case also the deadlines for payment of receivables for purchased fruit in relation to many suppliers were significantly exceeded. In some of the cases farmers received funds after over 200 days. On average, T.B. Fruit Polska had payment delays amounting to over 100 days, and the longest delay was almost a year. The company did not want to change its practice voluntarily.²⁵

61. UOKiK imposed on the undertaking a fine of PLN 8.3 million. This is 3% of the company's last year's turnover, which means the largest penalty for unfair use of contractual advantage. The decision is not final and may be appealed to the court. Hence—according to UOKiK—the necessity to impose a financial penalty at the maximum amount and to order to abandon the practice.

62. In addition to the decision, UOKiK issued calls to fourteen other processors, in which it stated its suspicions related to the possibility of abusing contractual advantage over farmers. These related to excessively long payment periods, failures to meet payment deadlines, or unclear methods of determining the price. In most cases, undertakings responded positively to UOKiK's letters—they introduced changes to contracts, shortened payment periods or undertook to settle arrears.²⁶

23 Decision of 1.10.2019, RGB-15/2019.

24 T.B. Group Fruit is the leader of the Ukrainian market and the third producer of concentrated juices in Europe.

25 Decision of 1.10.2019, RGB-15/2019.

26 https://www.uokik.gov.pl/aktualnosci.php?news_id=15813.

7. Other proceedings

63. UOKiK also conducted proceedings regarding a significant increase in butter prices. Although the main reason for the increase was the increase in demand in developing countries, while reducing production by major producers (New Zealand, Australia), there were signals that retail chains may be trying to take advantage of the situation and pressure butter producers to decrease its price. The authority decided to check this and initiated five explanatory proceedings in October 2017. They were conducted on the activities of the largest retail chains—Lidl Polska, Jerónimo Martins, Tesco Polska, Auchan Polska and Carrefour Polska. After collecting evidence, UOKiK decided that the networks had not exerted pressure on suppliers regarding prices. On the contrary, the rates were negotiable and frequently changed over the period considered due to large fluctuations in the price of milk.²⁷

64. In October 2019, the president of UOKiK initiated proceedings against Jerónimo Martins Polska Sp. z o.o. (the JMP), a company operating the Biedronka discount network. The president of UOKiK suspects that the rebate system used by JMP in relations with suppliers may be a type of abuse of contractual advantage. JMP in relations with suppliers, in particular fruits and vegetables, obtains two types of discounts. The first of these is specified in the contract as a percentage, and the latter is applied after exceeding the previously determined value of turnover (sales to Biedronka). The office is concerned by the second discount. Firstly, Biedronka's suppliers do not know its amount, and secondly they are informed about it at the end of the month, after completing the deliveries. Failure to grant this rebate results in a contractual penalty.

65. In the opinion of UOKiK, JMP's practice may constitute a violation of good morals and exploitation of the weaker party to the contract. As a result of these activities, the supplier of food products, mainly fruits and vegetables, is not sure whether to grant an additional discount or how big it will be. Thus, when entering into a contract, the supplier does not know how much it will earn. The proceedings are still ongoing.²⁸

V. Conclusion

66. Despite the fact that the Act is in force for a relatively short time, the activity of UOKiK is noteworthy. As it can be seen from the above analysis, cases are treated casuistically. In the case of defending farmers against specific practices, UOKiK often acts instead of common courts. Considering that the competences of the President of UOKiK have been extended, e.g., for the counteraction against payment gridlocks, more cases of this type and high fines can be expected. ■

27 https://www.uokik.gov.pl/aktualnosci.php?news_id=14103.

28 https://www.uokik.gov.pl/aktualnosci.php?news_id=15796.

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