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The Polish Competition Authority Gains New Powers to Fight Unfair Practices in the Food Industry

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The Act on Combating Unfair Use of Contractual Advantage in Trading in Agricultural and Food Products (the “Act”) will enter into force in the mid-2017.

The objective of the Act is to eliminate unfair trade practices between purchasers and producers (suppliers) of agricultural food products at every stage of the supply chain.

The new legislation designates the Polish Competition Authority, i.e. the President of the Office of Competition and Consumer Protection (the “PCA”) as an authority responsible for enforcing new regulations. Thus, the PCA will get a variety of new powers.

Contractual Advantage & Its Unfair Use

The new law prohibits the use of unfair contractual advantage in relations between the purchaser and the supplier.

In accordance with the Act, “contractual advantage” is defined as a situation in which the supplier has no sufficient and real possibility to sell its wares to other distributors and there is a significant disparity in the economic potential of the parties. Moreover, the Act provides that: *“use of contractual advantage shall be unfair if it contravenes good business practice and threatens or violates a material interest of the other party.”*

It is quite clear, that references to “significant disparity”, “good business practice” or “material interest” give a lot of room for broad interpretation of the new law. There is a risk that it will apply to a wide variety of market practices. Judging from the manner other provisions of the Polish law that invoke similar open references to “good commercial practices” are used in practice, we should rather expect that the new law will be interpreted broadly and in a rather “aggressive” manner (i.e. not only to the really serious infringements, but also to a variety of more subtle market situations).

Examples of the Unfair Exploitation

In particular, unfair exploitation of contractual advantage shall consist in:

- 1) Unjustified termination of the contract or threatened termination of the contract;
- 2) A situation in which only one of the parties is entitled to terminate or rescind the contract;
- 3) A situation in which the execution of a contract or its continuation is made contingent upon the

acceptance or fulfilment by one of the parties of another benefit or deliverable (e.g. remittances or provision of services) having no substantive or customary connection with the object of the contract;

4) Unjustified prolongation of payment deadlines for delivered agricultural or food products.

Law Turnover Thresholds

The application thresholds are set at the relatively low level, which means that the Act will apply to a vast majority of business relationships in the agricultural & food sectors.

The new regulations will apply to undertakings engaged in unfair practices, the annual turnover of which exceeds PLN 100,000,000 (approx. EUR 25,000,000) in the year preceding the year in which the proceedings were started, and to situations when the annual turnover between business partners (purchaser and supplier) exceeds PLN 50,000 (approx. EUR 13,000) in the year in which the proceedings commenced (or in any of the two preceding years).

Wide Investigative Powers

The procedure covered by the Act is closely based on the relevant provisions of the Act of 16 February 2007 on Competition and Consumer Protection and the administrative law model of proceedings.

This means that the PCA will be able to carry out dawn raids and/or request information and documents relevant to the proceedings. Should an undertaking refuse to comply with the request, provide misleading information, and/or evade/obstruct the inspection, the PCA may impose a fine of up to the equivalent of EUR 50,000,000.

The PCA is entitled to commence ex officio administrative proceedings whenever it obtains information that the provisions of the Act may be infringed. In addition, the new regulation allows each undertaking suspecting that unfair contractual advantage is being taken against it to report such circumstance to the PCA.

Heavy Fines

Finally, if the undertaking under investigation proves to have used contractual advantage in a prohibited manner, the PCA will be able to impose, by way of a decision, a fine of up to 3% of the annual turnover generated in the financial year preceding the year in which the fine is imposed.

The fine is set at a lower level comparing e.g. to fines for anticompetitive practices (where the maximum amount is set at the level of 10%), but it can still be significant.

What is Next?

The PCA signals that it will employ a relatively large team (of approximately 15 people) to enforce the new law and this means that there is an expectation that there will be a good number of cases to deal with.

It is quite obvious that the Act increases legal and regulatory risk for undertakings operating in different chains of the food supply. The risk will be particularly high in the first years of its operation when the decision practice of the PCA, as well as judgements of the courts of appeal,

will be clarifying the scope of the application of the new legislation.

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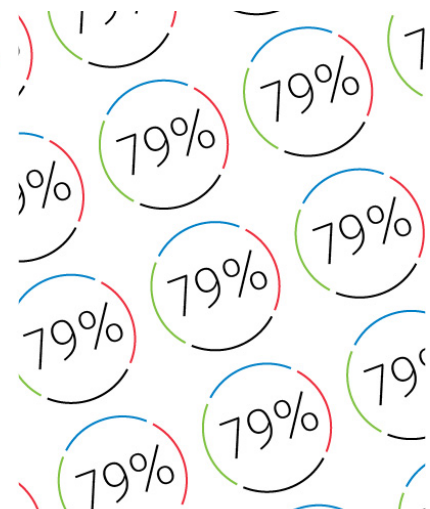
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