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Abuse of contractual power à la Polonaise – from facts to fairness?

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The Act on Combating the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products (the "Act") entered into force on July 12th, 2017. Its essential goal is to eliminate unfair market practices from every stage of the food product supply chain. The new legislation was to be (and still is) a 'cure-all' to the weakness of the system under which small entrepreneurs (e.g. farmers) are required to protect their rights in the course of costly, often lengthy and of limited effect, court proceedings. The Polish Competition Authority (the "PCA") was declared the "guardian of mercantile fairness", as under the Act is was granted the competence to impose high financial penalties, among other things, on those market players who abuse their contractual power.

The food sector has been waiting impatiently (in the case of smaller entities), or seriously concerned (in the case of larger players), for the new regulations to enter into force. Not surprisingly, it did not take long for the PCA to issue its first decision. It was published on March 7, just over half a year after the new law had entered into force, which is surely a decent achievement. However, as issuing administrative decisions is not a time-based competition, the merits of the case are far more interesting…

Facts

The target of the decision is a local undertaking that operates on the food processing market. In the course of its business, it purchases carrot roots from suppliers on the basis of cultivation contracts. The justification of the decision shows that model cultivation contract applied generally standard provisions, on the basis of which suppliers were bound to deliver products of a certain quality within a specific deadline. The supplier was to be notified of the planned collection time 3 days prior to the deadline. Payment, however, was to occur no later than 60 days from the last delivery. The supplier's consent for deduction of the so-called, "planter's fees" from the supplier's remuneration, to the benefit of an appropriate agriculture trade organization, was also provided in the contract.

The PCA accused the entrepreneur of undertaking unfair market practices, specifically by setting an excessively short period of time for collection (notification only 3 days prior to the deadline), which prevented suppliers from planning their work correctly. The extended payment period (60 days) and the provision regarding deduction of the so-called planter's fees from the remuneration was also found unjustifiable.

The accused undertook to voluntarily stop using questionable model cultivation contract terms and avoided financial penalty.

Regardless of the "conciliatory" settlement, the PCA's reference, in the justification of the decision, to the key conditions for the application of the Act gives some interesting food for thought.

A doubtful justification for public intervention

The PCA's intervention in trade relationships, under the Act's provisions, must be justified by the "protection of the public interest". The PCA took the stance that the fact that the addressee is a large enterprise, and – presumably – the scale of its contracts is equally large, is reason enough for it to take action. The problem is that such equation between the scale of the business and the existence of a public interest removes any substantive meaning from this condition of the Act's application, as the Act is intended to be applied to large-scale enterprises. This simplistic approach to the issue of public interest confirms the concerns of the food industry, that the PCA will be able to intervene, at will, in every case.

(Far too) easily definable contractual advantage

The issue of "unfair use of contractual advantage" was likewise dealt with in a similar simplified manner. Contractual advantage is, in principle, defined as a situation where a supplier has neither sufficient nor real possibility to sell its wares to other distributors, and where there is a significant disparity in the economic potential of the parties.

In examining this issue, the PCA first recalled that the 'accused' business exceeded the statutory revenue threshold of 100 million PLN (the Act, as a rule, may be applied solely to businesses whose revenue is at these levels). Assuming, automatically, that meeting these statutory revenue thresholds is synonymous with possessing a contractual advantage, is a dangerous precedent. This would mean that another condition for the application of the Act loses meaning.

The PCA's later statements, regarding the dependent relationship between the carrot producers and the 'accused' purchaser, are equally unconvincing. In particular, no attempt was made to examine if there were any alternative purchasers. This is important, as if the supplier is unsatisfied with the agreement, and is able to freely sell the carrots already produced to another purchaser, it is difficult to speak of any sort of dependent relationship. The failure to examine the general market environment was explained by claiming that carrot producers prefer to deliver to specific suppliers (who doesn't?) and that there is a need to tailor the product specifications to the expectations of the purchaser (which makes a carrot a pretty advanced and sophisticated product…). For the future, it would definitely be advisable that the Authority proves that it was actually impossible or at least difficult for the supplier to change their purchaser or the product type, in this or the next growing season, to declare that there was economic dependence.

Who actually sets good business practices?

Under the new law, the 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 was clear even during the legislative debate that, by stacking so many general terms together, the Act gives the PCA an almost unlimited interpretative leeway, while also opening the door to intervention in almost every situation.

The decision confirms those concerns. In assessing the specific terms the PCA relied on its own opinions as to their unfairness, never indicating if the very suppliers harmed complained of inconveniences related to the clauses challenged, nor examining whether they give rise to any negative consequences in practice.

Are we heading in the right direction?

As already indicated, the decision resolved the case on the basis of a settlement, where the PCA accepted the business' commitments. Surely this, very comfortable, situation influenced, at least partially, the laconic arguments contained in the justification of the decision, as the PCA could assume that there would be no appeal. But the decisions (especially precedent ones) do not only solve individual cases. They also signal to the market the direction the authority is heading. And this direction is worrying, as it basically allows the PCA, at will and on the basis of very subjective views, to challenge any situation when "someone big is not treating someone small fair". And this should not be the case. Unless we want to believe in technical sophistication of carrots…

This article was prepared in cooperation with Aleksandra Dziurkowska.

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