

Further Regulations of the Polish Retail Market

New Legislation in Preparation

The Polish government continues its efforts aimed at further regulating the Polish retail market.

Having taxed supermarket chains with special tax, which in the government's opinion is aimed at levelling the playing field between supermarkets and small Polish retail outlets, the government has decided to take the next step in furthering regulation of the retail sector with the new Act on Counteracting Abusing the Contractual Advantage in Trading Agricultural and Groceries which is currently being discussed in Parliament.

The purpose of the new Act is to protect both suppliers of food products as well as re-sellers (distributors) who purchase them for further trade. Having read the justification for the new act as presented by the government, one may believe that the new legislation is aimed at protecting small farmers and grocery suppliers against the abuse of bargaining power (induced by economic power) of large retail chains (supermarkets).

The official justification presented to Parliament reads that the Act aims to eliminate the imperfections and market power abuse present on the Polish retail market. The government further argues that small food and grocery suppliers are victims of predatory practices by large distributors, who abuse their market position by imposing onerous contractual provisions (such as additional fees for putting the goods on the shelf and extensive payment terms) or terminating the contracts with suppliers without good reason. In the government's opinion, such practices harm suppliers as well as the goodwill of the consumers; this in turn forces suppliers out of the market or encourages them to use cheap, sub-par products, thus endangering the security of the Polish food industry.

One needs to note that the matter of distributors imposing onerous conditions on suppliers, in most cases by requesting payments for the introduction of sold goods into trade or payments for unsolicited marketing services, is covered by the Act of 1993 on Counteracting Unfair Competition. There are numerous courts' judgements finding that such practices constitute acts of unfair competition and ordering recovery. However, the government has found such protection to be inadequate, citing that the court proceedings take a lot of time, are cost consuming, and that the supplier should instead openly confront the distributor and face possible reprisals from them.

The new piece of legislation is very clearly based on the provisions of the Act on Competition and Consumers Protection of 2007, and the administrative law model of proceedings. It entrusts the Chair of the Office for Competition and Consumers Protection (OCCP) with wide and discretionary powers to intervene when "abuse of contractual advantage" occurs. The 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. If the so defined "contractual advantage" is used in a way contradictory to good customs and violates material interests of the other party, the OCCP has the right to intervene and commence ex office administrative proceedings. During such proceedings the OCCP may request information from the parties, conduct searches, request entry into premises and production of documents – on the same terms and conditions as those provided for in antitrust cases.

If the proceedings carried out by the OCCP lead to the conclusion that the abuse of contractual advantage has occurred, then the OCCP will issue the decision ordering cessation of such practice. It is not yet clear what this would mean in practice – would the OCCP point out in its decision which specific parts of the contract breach the Act and how, or would it simply declare that the contract contains provisions breaching the Act? The first answer seems to be the correct one, though it is possible that the OCCP would not provide an explanation of how the contract should be drafted in order for it to be legally binding, and this may be left up to the parties to decide. Further, the OCCP may impose on the party that has abused the contractual advantage, a fine of up to 3% of the fined party's annual turnover. Additional fines may also be imposed on the party, as well as its employees, for obstructing the proceedings or providing misleading information during the proceedings.

In summary, the purpose of this new piece of legislation is to give additional power to the OCCP, which is expected to use it to protect food suppliers against the predatory practices of distributors. The government entrusts the task of legal protection of the suppliers (usually farmers or small cooperatives) and moves the onus of providing such protection from common courts to the administrative authority.

The Act introduces preferential treatment for a specified category of suppliers – only food suppliers will be protected by the Act, while the suppliers of other goods are excluded and forced to seek protection in common courts.

Criteria listed in the Act are very general, therefore almost every agreement could be challenged – please note that even a threat concerning termination of the agreement is considered an abuse. The proposed regulation uses unclear and imprecise terms, such as, “sufficient and real possibility of sale of (...) products” and “significant disproportion in economic potential”. On one hand, such language is rather typical in regulations concerning competition and counteracting fair trade abuses. However, on the other hand, it will take some time to develop a common understanding of the above terms.

The Ministry of Agriculture estimates that within 10 years of the Act coming into force, the income from penalties should be around PLN 20,000,000 (the violating entities should pay around PLN 53,000,000 to the budget, while the costs of hiring new personnel in connection with the Act should be around PLN 33,000,000). The planned fines for entities abusing contractual advantage are high, though it should be noted that there is a general trend in the proceedings towards decreasing the penalties imposed on the companies.

We will soon see the effects of implementing the Act on Counteracting Abusing the Contractual Advantage in Trading Agricultural and Groceries for the Polish market. However, even at this stage, it is possible that this new regulation may force the companies to look for business partners (suppliers) outside Poland in order to minimize risk. As a result, it may appear that the regulation which was designed to protect small farmers and suppliers of groceries has actually caused negative consequences for the latter.

The Act should enter into force after six months as of its publication in the official Journal of Laws.

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