

New UOKiK Mission – Combating the unfair use of superior bargaining power (From the Editor)

Opening Article

Piotr Adamczewski, **100 days of the Act on superior bargaining power**

Table of contents:

- I. Introduction
- II. Proceedings run by the President of the Office of Competition and Consumer Protection (UOKiK)
 1. Preliminary proceedings
 - 1.1. Sugar production – supply of sugar beets
 - 1.2. Milk supplies to dairy producers
 - 1.3. Industrial apple purchase
 2. President of the Office of Competition and Consumer Protection contacts undertakings
- III. Cooperation of the President of the Office of Competition and Consumer Protection with bodies engaged in superior bargaining power issues
- IV. Popularization of the issues related to the Act on superior bargaining power
- V. Summary

Abstract: The article discusses 100 days of the Act of 15th December 2016 on combating the unfair use of superior bargaining power in the trade in agricultural and food products. The Author describes cases that the President of the Office of Competition and Consumer Protection (referred as the President of UOKiK) is currently dealing with, along with other instruments used as a tool in combating unfair practices. The next issue tackled is the cooperation of the President of UOKiK with other relevant bodies in the context of handled cases and a possible legislation process. Afterwards the Author analyses the popularization of the Act among the public and the obstacles encountered in its application. The Author stresses that, at this moment, it seems to be crucial to find an accurate meaning of the term ‘public interest’ used in the context of the Act and a flexible approach to the scope of practices described as unfair (keeping in mind economic analyses). As a result, the Author states that despite the very short time the Act has been in force, numerous actions have already been taken. Still, the Act contains ambiguous terms that should be elaborated by the judiciary and the doctrine.

Key words: superior bargaining power, public interest.

JEL: L50

Articles

Michał Roszak, Bartosz Turno, **Superior bargaining power in trade and its unfair use in German and French regulations – tips for the Polish case-law and the legislator?**

Table of contents:

- I. Introduction
- II. German law
 1. Regulations regarding the unfair use of superior bargaining power in German law
 2. Indications of relative market power
 3. Relative market power versus market dominance in relation to small and medium sized competitors under Article 20 item 3 of GWB
- III. French law
 1. Regulations regarding superior bargaining power in French law
 2. Cases of abuse of economic dependence in French law
- IV. Polish solutions
 1. Superior bargaining power definition and problems as to its interpretation
 2. Unfair use of superior bargaining power definition; the interest of the other party
- V. Summary

Abstract: The article presents German and French legal solutions and laws regarding the unfair use of superior bargaining power. It discusses the way the definitions of market power and its abuse are understood in these jurisdictions. Also, Polish legal solutions are analysed in detail (i.e. critical interpretation of the superior bargaining power definition). At the end, the Authors reflect on which German and French solutions could be transferred into Polish law.

Key words: superior bargaining power, unfair use of superior bargaining power, market power.

JEL: K21

Grzegorz Koguciuk, **Tackling unfair trading practices in the business-to-business food supply chain – legal solutions in Ireland**

Table of contents:

- I. Introduction
- II. Scope of the regulation
- III. Contracting rules, fair practices
- IV. Complacence of legal requirements, compliance
- V. Sanctions for the infringement of rules on the cooperation between a customer and a supplier specified under the new Act
- VI. Comparison of Irish and Polish solutions
- VII. Summary, final remarks

Abstract: The article presents Irish regulations applied to business relationships in the food supply industry aimed at tackling unfair trading practices applicable in business relationship. The historic background of adopting such rules clarifies that numerous activities have been undertaken in Ireland to achieve efficient solutions and the *modus operandi* to regulate this matter. Subsequently, the characteristics of the adopted regulation are presented – also in comparison to the relevant

Polish Act – the Act on combating the unfair use of superior bargaining power in the trade in agricultural and food products. Furthermore, the contracting rules set by the new Act for that sector are described – together with accompanying obligations imposed on retailers/wholesalers of food products. Lastly, the article describes sanctions for an infringement of the discussed regulation – both in the private and public area.

Key words: Irish regulation, antitrust law, abuse of economic dependency, unfair practices, unfair trading practices, superior bargaining power, food supply industry, use of superior bargaining power.

JEL: K21, K42

Agnieszka Staszek, Mateusz Mroczek, **Statutory conditions establishing a superior bargaining power in the practice of the unfair use of superior bargaining power in the trade in food and agriculture products**

Table of contents:

- I. Introduction
- II. Absence of sufficient and real opportunities to sell (purchase) food and agriculture products
 1. General remarks
 2. Absence of sufficient opportunities to sell (purchase)
 3. Real opportunities to sell (purchase)
 4. Subjective or objective judgement?
- III. Significant economic disparity
- IV. International context
- V. Final remarks

Abstract: The new Act on combating the unfair use of superior bargaining power entered into force on 12 July 2017. This new law introduces into the Polish legal system a completely new institution prohibiting the unfair use of superior bargaining power in relations between the purchaser and the supplier. The article describes the statutory conditions for the existence of a superior bargaining power within the meaning of the Act – which are the absence of sufficient (“wystarczających”) and real (“faktycznych”) opportunities to sell (purchase) agricultural or food products to other purchasers (from other suppliers), as well as a significant economic disparity between the contracting parties. The Authors analyze the above mentioned statutory conditions, using a literal and a functional interpretation supported with legal concepts arising from the closely related competition law. The article also outlines the international context of this issue.

Key words: supplier; purchaser; agricultural or food products; superior bargaining power; relevant market; sufficient and real opportunities to sell (purchase).

JEL: K21

Antoni Bolecki, **Unfair use of superior bargaining power by retail chains against food suppliers – examples of potentially forbidden practices**

Table of contents:

- I. Introduction
- II. Legal definitions
- III. Practices concerning the drafting of the wording of an agreements and its execution

- IV. Practices concerning costs and fees
- V. Remaining types of practices
- VI. Charging unfair prices – is it a practice excluded from the Act?

Abstract: The aim of the article is: a) presenting a list of practices which may be deemed to be an unfair use of superior bargaining power by retail chains against food suppliers; b) explaining how such practices work and why they can be found illegal.

Key words: superior bargaining power, retail chains, food suppliers, unfair market practices.

JEL: K20, K21

Bartosz Wyżykowski, **Effects connected with the finding of unfairness of a contract term by a court in an incidental proceeding**

Table of contents:

- I. Introductory remarks
- II. Objectives of Directive 93/13 on unfair terms in consumer contracts
- III. Opinions in doctrine and jurisprudence
- IV. Maintaining unfair terms
- V. Changes in the contract
- VI. Conclusions

Abstract: The article analyses regulations, as well as judicial and doctrinal opinions, with regard to problematic aspects of how the fact that a consumer contract contains one or more unfair terms affects such contract. The analysis mainly focuses on the effects of a judgement of a competent court in an individual case of a consumer. Also, very important is the current jurisprudence of the Court of Justice of the European Union and its impact on the interpretation of Polish regulations in the subject matter. Moreover, considered are also practical difficulties as well as questions regarding the restitutive effects which may be connected with a finding of unfairness of contract terms by a court. Finally, the aim of the article is to analyse the admissibility of various instruments the courts may seek to make use of in order to substitute or fill the gap caused by a finding of unfairness of a term, and determine the advantages and disadvantages of such instruments.

Key words: consumer protection; consumer contracts; unfair contract terms; restitutive effects.

JEL: K12, K15, K41

Competition law abroad

Konrad Kohutek, **Singapore: a small country with liberal competition law**

Table of contents:

- I. General remarks
- II. Prohibition of competition-restricting agreements
- III. Prohibition of abuse of a dominant position
- IV. Exemptions from the prohibitions provided for in competition law
- V. Selected procedural issues

VI. Legal consequences of a violation of Singapore competition law

VII. Summary and final remarks

Abstract: This paper presents selected regulations of competition law in Singapore, paying particular attention to legal solutions which are different from those that are applicable in EU or Polish competition law. The issue of concentration control in Singapore law has been omitted.

Key words: Singapore competition law, prohibition of competition-restricting agreements, prohibition of abuse of a dominant position, exemptions from the competition law prohibitions, an individual notification procedure, “fast-track” procedure.

JEL: K21

Legislation and Case Law Reviews

Ilona Szwedziak-Bork, *Entia non sunt multiplicanda praeter necessitate – on the necessity of the enactment of the Act on combating the unfair use of superior bargaining power in the trade in agricultural and food products*

Table of contents:

- I. Introduction
- II. The Act on combating the unfair use of superior bargaining power in the trade in agricultural and food products – general issues
- III. The Act as a ‘protective umbrella’ for weaker contractual parties
- IV. Threat to a weaker contractual party’s fundamental interest or its infringement
- V. The President of UOKiK as the competent authority
- VI. Final remarks

Abstract: The aim of this paper is to underline some essential doubts indicated by certain authors and related to the Act on combating the unfair use of superior bargaining power in the trade in agricultural and food products. Despite ambitious goals concerning the protection of public interest and weaker contractual parties in trade relations in the agricultural and food sector, the Act is considered as a source of interpretative problems, especially for entities to which it is addressed.

Key words: bargaining power, agricultural and food products, counterparty’s fundamental interest, competition authority.

JEL: K21

Piotr Skurzyński, Maciej Gac, *Unannounced inspections made by the President of the Office of Competition and Consumer Protection (UOKiK) – new standard for the gathering of electronic evidence*. Commentary on the order of the Polish Court of Competition and Consumer Protection of 7 March 2017, XVII Amz 15/17

Abstract: The commentary discusses the order of the Polish Court of Competition and Consumer Protection (SOKiK) regarding the powers of the Polish Competition Authority (the President of the Office of Competition and Consumer Protection) to search IT systems and hardware (e-mails and hard disks) during dawn raids. This order prohibits the current practice of the President of the Office of Competition and Consumer Protection whereby electronic data is copied without prior selection and taken away from the premises of the inspected undertaking for further

analysis at the authority's premises. The order clearly states that the President of the Office of Competition and Consumer Protection conducting an unannounced inspection is obliged to select evidence at the premises of the undertaking, and copy only that information which is relevant to the case. The analysed order also confirms the need for the protection of legal professional privilege within antitrust inspections, and creates the grounds for further debate on its possible scope.

Key words: unannounced inspection; electronic evidence; legal professional privilege.

Elżbieta Krajewska, **Legal succession in competition law proceedings – commentary to the judgment of the Supreme Court of 6 April 2017, III SK 15/16**

Abstract: The commentary summarises the judgment of the Supreme Court which clarified that the acquiring company is a legal successor of the target company in competition law proceedings, where a decision imposing a fine was originally addressed to the target company but delivered already to the acquiring company. Due to lack of specific rules in the Polish Competition Act governing legal succession, the Supreme Court strongly recommended the introduction of such rules.

Key words: acquisition of the company, legal succession in competition proceedings.

Maciej Bernatt, ***Ne bis in idem* principle in competition law – case report on the Polish Supreme Court's reference for a preliminary ruling of 26 September 2017 (III SK 39/16)**

Abstract: The Polish Supreme Court made a reference for a preliminary ruling in a case involving double fines for the same anticompetitive conduct (first fine for a violation of Polish competition law and second fine for a violation of Article 102 TFEU). The Court asks whether the identity of the 'interest protected' can be considered as a separate condition in the context of a *ne bis in idem* analysis. In addition, it also asks for clarification whether national competition law applied in parallel with Article 101-102 TFEU can be said to protect different legal interests. The reference is of importance for a uniform understanding of the *ne bis in idem* principle in EU and ECHR case-law, as well as for the adequate functioning of decentralized enforcement of Arts 101-102 TFEU. It also addresses the problem what standard national courts should apply where differences exist between ECtHR and CJEU fundamental rights case-law.

Key words: *ne bis in idem*, national competition authorities, fines, European Convention on Human Rights, Charter of Fundamental Rights.

Marcin Mleczko, **When is the fine proportional? Case report on the Polish Supreme Court judgement of 13 June 2017, III SK 43/16**

Abstract: In the judgement of 13 June 2017, III SK 43/16, the Polish Supreme Court provided guidance on how to set fines for Resale Price Maintenance and recognized the privilege against self-incrimination.

Key words: fines, vertical agreements, privilege against self-incrimination.

Conference Reports

i Marcin Mleczko, **International Seminar Reform of Regulation 1/2003: Effectiveness of the NCAs and Beyond**, Competition Law Scholar Forum and Centre for Antitrust and Regulatory Studies, University of Warsaw, 28 April 2017

K Magdalena Knapp, Paulina Korycińska-Rządca, **6th International PhD Students' Conference on Competition Law**, University of Białystok, 27 April 2017

A

R