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### Articles

**Krzysztof Żebryk**, The ineffectiveness of *pactum de non cedendo* under the Act on Counteracting Excessive Delays in Commercial Transactions as an instrument of countering unfair contractual practices

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- I. Introduction
- II. *Pactum de non cedendo* – general legal characteristics
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- IV. The ineffectiveness of *pactum de non cedendo* as an instrument of countering unfair commercial practices

**Summary:** In contracts concluded in the course of trade, contractual limitations are quite common that exclude or restrict the admissibility of transferring debt, owed to a creditor under a commercial transaction, without the consent of the debtor (*pactum de non cedendo*). Due to disproportions in contractual strength, which put the weaker party to the contract in a position of economic dependence, contractual clauses of this type may be a problem affecting the financial condition of micro, small and medium-sized enterprises, as well as maintaining their financial liquidity. In a broader context, they may be a problem for maintaining competitiveness overall. The Polish legislator noticed that such a contractual provision may bear the marks of an unfair practice used in the relations between entrepreneurs, if it is accompanied by a delay in the payment of remuneration as compared to the payment deadline specified in the contract. Therefore, the Polish legislature decided to introduce a hitherto unknown mechanism for counteracting unfair practices, consisting of the recognition of *pactum de non cedendo*, in commercial transactions between large entrepreneurs and those of a SME nature, after the expiry of the contractual payment deadline. This article addresses the problem of assessing whether the new rules concerning the ineffectiveness of *pactum de non cedendo* is an appropriate instrument for combating unfair commercial practices, and whether it has a chance to become an effective instrument.

**Key words:** transfer of debts; *pactum de non cedendo*; delays in payment in commercial transactions; ineffectiveness of a legal act; counteracting unfair commercial practices

**JEL:** K210, K200, K120

**Aleksandra Dziurkowska, Tomasz Feliszewski**, Public law protection of fair payment terms in the light of the enforcement experiences of the President of UOKiK on the basis of the 2020 Act on Counteracting Excessive Delays in Commercial Transactions

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**Summary:** The aim of the article is to analyze the reasons why the Polish legislator decided to introduce administrative and legal tools in order to fight against payment gridlocks. The paper also provides statistical data of previous proceedings conducted by the President of UOKiK on the basis of the Act on Counteracting Excessive Delays in Commercial Transactions. In addition, it discusses how such proceedings look like in practice from the perspective of the undertakings concerned, and what practical problems must be solved by the involved entrepreneurs in order to meet the expectations of President of UOKiK.

**Key words:** payment gridlocks; President of UOKiK; financial penalty; public protection; administrative proceedings; undertakings' rights; procedural fairness

**JEL:** K21, K42, L49

**Jadwiga Stryczyńska Kamila Białasik**, Issues of “constitutionality” of the method of calculating and adjusting administrative penalties imposed on entrepreneurs resulting from the Act on Counteracting Excessive Delays in Commercial Transactions

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**Summary:** Proceeding conducted on the basis of the Act on Counteracting Excessive Delays in Commercial Transactions (the Act), cause significant doubts of a practical and interpretation nature. The structure of some of the provisions introduced by the Act gave rise to doubts which, due to their nature and the position of the entrepreneur, may be perceived as violating the basic rights of a party in administrative proceedings. Practice shows that some of the rules of the Act have caused a difference in the state of entrepreneurs in similar factual situations. Moreover, the conducted proceedings, their length and their level of complexity, have also affected the amount of the adjudicated administrative penalties. The article addresses problems related to the model of calculating administrative penalties and their adjustment before the amendments of the Act of 8 December 2022 and after their introduction. The authors also analyzed the regulatory solutions introduced in other European countries.

**Key words:** congestion; administrative penalties; moderating punishment; delays in commercial transactions; congestion law; cash benefits

**JEL:** K12, K23, K42

**Krzysztof Kanton,** Allocation of the burden of proof in administrative proceedings conducted under the Law on Counteracting the Unfair Use of Contractual Advantage in the Trade of Agricultural and Food Products

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**Summary:** The article analyzes evidentiary aspects in proceedings conducted by the President of the Polish Competition and Consumer Protection Authority (President of UOKiK) on the basis of the legal provisions on counteracting the unfair use of contractual advantage in the trade of agricultural and food products. The above aspects, including the fundamental issue of the allocation of the burden of proof within the framework of administrative proceedings, are currently gaining in importance, taking into account UOKiK's strict policy of enforcing the above provisions, and the increasing penalization imposed on entrepreneurs under the legislation in question. It is particularly crucial to ensure compliance with the principle that places the burden of proving a violation on the President of UOKiK, while at the same time excluding negative consequences for the entrepreneur when the administrative body fails to fulfill this task. These principles are discussed in the first part of the article. The above assumptions are then confronted with practical experiences, taking into account the decisions of the President of UOKiK (part two of the article). This analysis shows that the relevant standards are not fully observed, which manifests itself, among other things, in the replacement of empirically

established facts with far-reaching presumptions. The article also draws attention to the practice of drawing negative consequences for entrepreneurs in the case of a failure to provide evidence, which translates into the formulation of theses contrary to those raised by the entrepreneur.

**Key words:** President of UOKiK; counteracting unfair exploitation of contractual advantage in the trade of food products; burden of proof; standards of protection of the entrepreneur in administrative proceedings; agricultural and food products; evidence initiative; evidence procedure of the President of UOKiK; procedural guarantees; retail chains; contractual advantage; economic potential; presumption of innocence; negotiation of commercial contracts

**JEL:** K20, K23, K42

**Paweł Sopalski**, Presumption of significant disparity in economic strength under the Act on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products

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**Summary:** The new Act on counteracting the unfair use of contractual advantage in the trade in agricultural and food products is related to the implementation of Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. It introduces a presumption of a significant disproportion in economic strength by indicating the thresholds for the annual turnover of entities that are subject to assessment. The presumption is an evidentiary short cut in the course of proceedings. The use of the presumption requires the turnover of the entrepreneur to be established, taking into account companies linked and partnered with the investigated entrepreneurs. The article focuses on a discussion of the use of the presumption.

**Key words:** unfair trading practices; contractual advantage; presumption; economic potential

**JEL:** K41, K42

**Magdalena Knapp, Piotr Włodawiec**, The role and powers of non-governmental organizations (NGOs) in proceedings on practices of an unfair use of a contractual advantage

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- II. The role of NGOs in proceedings on practices of an unfair use of a contractual advantage
- III. Powers of NGOs prior to the initiation of administrative proceedings by the President of UOKiK
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VI. Conclusion

**Summary:** The article outlines the actions that a non-governmental organization can take at various stages of proceedings on practices of an unfair use of a contractual advantage. The NGOs can mitigate the effects of the so-called “fear factor”, which allows stronger buyers to impose unfair terms of cooperation on their “weaker” suppliers. The authors analyze the procedural rights of NGOs in administrative proceedings pending before the President of UOKiK, and in judicial proceedings conducted before the Polish Competition and Consumer Protection Court (SOKiK) as a result of an appeal filed against a decision issued by the President of UOKiK. The article also points out what actions can be taken by NGOs to improve the position of weaker players in the food supply chain prior to the initiation of relevant proceedings. The analysis of the relevant legal provisions shows that NGOs have limited possibilities to participate in ongoing proceedings on practices of an unfair use of a contractual advantage.

**Key words:** non-governmental organisations; non-profit organisations; administrative proceedings; civil procedure; proceedings on practices of unfair use of the contractual advantage; contractual advantage

**JEL:** K20, K23, K42

### Reviews of Law and Jurisdiction

**Piotr Gogol, Aleksandra Ziemnicka,** The decision-making practice of the President of UOKiK in excessive delays in payments cases

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- III. Force majeure in the decision-making practice of the President of UOKiK
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- V. Conclusions

**Summary:** This article summarizes the key conclusions resulting from the decision-making practice of the President of UOKiK in cases of excessive payment delays in proceedings completed in 2021–2022. The analysis includes the duration of the proceedings, the method of their closure, as well as the problem of the interpretation of the legal concepts affecting the direction of the decisions issued.

**Key words:** payment gridlock; commercial transaction; President of UOKiK; force majeure

**JEL:** K21

**Adrian Źądło,** Protecting the rights of sellers on multilateral platforms under the Digital Markets Act (DMA) regime – selected issues

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**Summary:** This article discusses the two legal regimes that will apply in the future to the operation of multilateral marketplace platforms – the first arising from general EU competition law, and the second introduced through the application of the Digital Markets Act. The former is discussed based on reports, legal literature, and the decisions issued by the European Commission in the combined cases AT.40462 *Amazon Marketplace* and AT.40703 *Amazon Buy Box*. The other legal regime to affect the operation of multilateral marketplace platforms is based on an analysis of the Digital Markets Act and other relevant legislation. Finally, after the comparison, answers are formulated to the questions whether the Digital Markets Act responds to the problems encountered by general EU competition law, and if so, by way of which mechanisms. It also considers whether the DMA represents a “revolutionary” or an “evolutionary” change in EU competition law overall.

**Key words:** Digital Markets Act; competition law; multilateral platforms

**JEL:** K21, K24, K41

**Dominik Borek**, Case comment on the judgment of the Polish Supreme Administrative Court (NSA) of 17 February 2023, ref. no. act: II GSK 1458/19, on the assessment of the constitutionality of the sanction of repealing the classification and categorization of an entity as a hotel facility, and the deletion of such entity from the register of hotel facilities

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**Summary:** This article quotes the facts described in the judgment of the Polish Supreme Administrative Court (NSA) of February 17, 2023, file ref. file: II GSK 1458/19. The commented judgment is of great importance for the Polish hotel market, as it concerns the possibility of issuing, under the current legal regime, of decisions repealing the classification and categorization of an

entity as a hotel facility and to its removal from the relevant register of hotel facilities, when it is established that the entity in question does not meet the requirements of fire, sanitary or construction safety. The constitutionality of the current legal provisions is assessed in the discussed judgment.

**Key words:** hotel; manager of the hotel base; hotel facility; register of hotel facilities

**JEL:** K20, H12, M11

### Book reviews

Review of the book by Magdalena Knapp, *Ochrona prawna przedsiębiorców w interesie publicznym przed nieuczciwym wykorzystywaniem przewagi kontraktowej* [Legal protection of entrepreneurs in the public interest against the unfair use of a contractual advantage], Wydawnictwo C.H. Beck, Warszawa 2022 (**Konrad Kohutek**).