CONTENTS, SUMMARIES AND KEY WORDS

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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

Table of contents

I. Introduction
II. Pactum de non cedendo – general legal characteristics
III. The construction of the ineffectiveness of pactum de non cedendo in the Act on Counteracting Excessive Delays in Commercial Transactions
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; countering 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

Table of contents

I. Introduction
II. The 2020 Act on Counteracting Excessive Delays in Commercial Transactions – the perspective of the President of UOKiK
1. Introduction of public law protection in the context of payment gridlock
2. New powers of the President of UOKiK based on the Act
3. Enforcement practice after the entry into force of Act (in figures)
4. The 2022 Amendment of the Act – reasons and expected effects

III. The course of the procedure – practical remarks
1. Preliminary phase
2. Formal phase – analysis of obligations
3. Analysis of the circumstances for waiving the imposition of a fine
4. Final phase of the proceedings

IV. Summary
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 Stryczynska 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

Table of contents
I. Introduction
II. The system of imposing fines on entrepreneurs in selected European countries
III. General – constitutional, criminal and conventional assumptions regarding the imposition of penalties on entrepreneurs
IV. Principles of calculating the fine and its amount under the provisions of the Act on Counteracting Excessive Delays in Commercial Transactions in force until 8 December 2022
1. Method of calculating the penalty
2. Principles of penalty assessment
3. Waiver of penalty
V. Principles of determining the fine by the President of UOKiK under the rules applicable after 8 December 2022
1. Ratio of introducing discretion when imposing an administrative penalty
2. Reasons for waiving punishment
   2.1. Decision to repeal the provision of Article 13v (6) of the Act (premise for mandatory waiver of penalty)
   2.2. Decision to repeal the provision of Article 13v, paragraph 8 of the Act (optional waiver of punishment)
2.3. Decision to leave in effect the provision of Article 13v, paragraph 7 of the Act *(force majeure)*

3. Penalty adjustment rules

VI Summary

**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

**Table of contents**

I. Introduction

II. Standard of proof in proceedings on practices of an unfair use of contractual advantage

III. Standard of proof in proceedings on practices of an unfair use of contractual advantage – practical aspects

1. Shifting the burden of proof

IV. Conclusion

**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

Pawel 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

**Table of contents**

I. Introduction

II. Presumption

III. Presumption of a significant disproportion in economic strength
   1. Definition of contractual advantage
   2. Thresholds for annual turnover
   3. Annual turnover of the undertaking
   4. Links between undertakings
   5. Evidence in rebuttal
   6. Decisional practice of the President of UOKiK

IV. Conclusion

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

**Table of contents**

I. Introduction

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

IV. Powers of NGOs within the administrative proceedings carried out by the President of UOKiK
V. Powers of NGOs in civil proceedings

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

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**Reviews of Law and Jurisdiction**

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

**Table of contents**

I. Introduction

II. Proceedings on excessive payment delays
   1. Duration of the proceedings
   2. Directions of the decisions

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

IV. A “justified case” in the decision-making practice of the President of UOKiK

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

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

**Table of contents**

I. Introduction

II. Problems of applying EU competition law to the activities of platform providers in digital markets

---
1. Regulatory model
2. Length of proceedings
3. Private enforcement
4. Commitment decisions AT.40462 Amazon Marketplace and AT.40703 Amazon Buy Box

III. DMA – the description of the legislative act
1. Application to platform providers
2. Rationale and procedure for recognizing platforms as gatekeepers and the imposition upon them of related obligations
3. Obligations under the DMA

IV. Problems of EU competition law and the position of business users in the DMA regime
1. Efficiency
2. Ex-ante regime
3. Substantive modification of the obligations
4. Enforcement of obligations under the DMA

V. Conclusion

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

Table of contents
I. General issue – active legitimacy of the authority
II. Brief discussion of the facts
III. Approval of the position of the Supreme Administrative Court (NSA) and reference to the judgment of the Higher Administrative Court (WSA) as well as preceding administrative rulings
IV. Conclusions

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**