Centre for Antitrust and Regulatory Studies

Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries

Edited by
Anna Piszcz
Adam Jasser

Warsaw 2019

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Contents – summary

Contents

Anna Piszcz*
and Dominik Wolski**

Introduction

This book is devoted to the legal framework for business-to-business (B2B) unfair trading practices (UTPs) in the food supply chain in eight selected central and eastern European Union member states (CEE) – Bulgaria, Czech Republic, Croatia, Estonia, Hungary, Lithuania, Poland and Slovakia. Combating UTPs in the food supply chain as well as a corresponding legal framework are not a completely new concept in CEE. However, it goes without saying that compared to western EU member states, some limitations derived from the long-lasting lack of a free market have been in existence.

Even though the process of adopting the legislation aimed at combating UTPs in CEE has recently grown in importance, a great legacy of discussions, experience and regulations, both public and private, belong to their west-European partners. The first chapter of this book is therefore a summary of the experience and legislation aimed at combating UTPs in the food supply chain in six west European EU nations (France, Germany, the Netherlands, Portugal, the United Kingdom and Italy), offering some background to more recent efforts in this area undertaken by CEE nations.

Discussing the UTPs and current state of play of their legal framework it is important to notice, that UTPs constitute a part of unfair competition field and unfair competition law respectively (UCL). The latter is defined as making a distinction between acceptable (fair) and unacceptable (unfair) market conduct and that aims at the promotion of the former and the

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repression of the latter. The beginnings of harmonizing efforts in this respect date as early as the 1960s and Max-Planck Institute research group charged with the task of producing comparative study on UCL (Tomé Feteira, 2017, p. 79). This observation is particularly important when considering the concept of the UTPs in food supply chain that should always be embedded in broader context of unfair competition and UCL. Moreover, the issue of the UTPs and their legal frameworks is even more complex when bearing in mind the tension between the UTPs and competition law. Arguably, this was also the reason why for so long time the European Commission has been presenting reluctant viewpoint in relation to legal instrument addressing the UTPs at the EU level, supporting national development of the UTPs' regulations instead (Tomé Feteira, 2017, p. 81 and Daskalova, 2018, p. 7–8 and p. 31). Consequently, western Europe countries began their adventure with legislation regulating UTPs almost as early as the formation of the European Community. In individual countries that meant already the 1950s, although, this idea at the Union level was addressed only recently in 2009, when the European Commission published its first communication on the subject.[1] Therefore, western EU member states have come a long way in this respect.

With more and more new member states also adopting relevant legislation on combating UTPs and taking into account recent efforts to address the issue at the Union level, it is clear that the development of legal measures addressing UTPs in the food supply chain is ongoing. It is important to stress, however, that the shape of legal regulations substantially differs between member countries, depending on the legal cultures and specific features of their food supply chains. The former is brilliantly illustrated in one of the studies analyzing the outcome of the appeal courts decisions in the context of the judges' origins. As we can learn from the study, the differences in legal culture and judges' legal education really matter (Zhang, Liu and Garoupa, 2017). In this respect, divergences between common law and civil law countries in relation to both the institutional set-up and legal measures (i.e. private/contract law vs. public law), are noticeable.

A significant factor that influences development of legislation addressing UTPs in the food supply chain are the conflicting urges to enhance economic freedom and the freedom to enter contracts on the one hand, and to protect weaker market participants such as small businesses and farmers

[1] Commission Communication COM(2009) 591: A better functioning food supply chain in Europe http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf (accessed 7.02.2019).

on the other. Much higher levels of concentration of economic power among retailers and huge food processing companies compared to mostly fragmented farm sector is often spurring political action for greater state intervention into contractual relationships between farmers and wholesalers and retailers. Farmers are an important political constituency in many EU nations, and the defense of their economic interests is on the agenda of many mainstream parties. On the other hand, consumer groups and businesses are often concerned that too much protection for farmers could result in less efficient business practices, loss of competitiveness, higher prices and less choice for consumers. Hence, the need to maintain the right balance between those competing values is always at the heart of disputes and legislative proposals concerning UTPs. No surprise then, that national reports describing UTPs legislation in eight CEE countries in this book also show slightly diverging attitudes and solutions constituting less and more stringent regimes. This is because even if the vast majority of the EU member states shares minimum common understanding of a behavior that qualifies as demonstration of unfair conduct, the notion and scope of the latter noticeably differs (Tomé Feteira, 2017, p. 80 and Schebesta, Purnhagen, Keirsbilck and Verdonk, 2018, p. 3).

Even though sometimes arguments being raised between proponents and opponents of strict legal regulation of the UTPs in CEE, seem to rehash debates already had many years ago in western Europe, the solutions adopted not always seem to reflect that experience.

One important factor in these considerations was the question to what extent the EU single market was based as much as on competition as on the notion of fairness. After World War Two, at the beginning of the European Community, most European states had no competition regimes in place to guard against monopolization and abuse of economic power. Taking a cue from the United States, and backed by the German neo-liberal Freiburg School, the EC founders were attracted to the idea of relying upon decentralization of economic decision-making and allowing a greater role for market forces instead of state intervention (Jones, 1999, p. 24–25). However, from the outset of the EC, the objectives of the community competition laws were meant to be broader than the US antitrust law. Therefore, even if elimination of obstacles to the single-market integration was of the greatest importance, the notion of competition has been embracing fairness, too. This in turn included protection of small and medium-sized enterprises (Jones, 1999, p. 26–27). Additionally, poverty among farmers in the run-up to the war, convinced politicians constructing the Community that the state must protect this group particularly strongly. This laid the foundation to today's

generously funded Common Agricultural Policy (CAP), which is largely outside the remit of competition and state aid rules. Moreover, recently CAP has extended capturing more objectives and making farmers responsible for preserving the traditional landscapes of Europe, local knowledge about small-scale food production, etc. (Daskalova, 2018, p. 15). What should not be missed when discussing UTPs and CAP is that, the latter led to consolidation of produces, arguably at expense of the consumers, at least in part (Daskalova, 2018, p. 20–21). For other sectors, the attention of the founding fathers and drafters of the Treaty of Rome,[2] was focused to ensure that there are no distortions to competition in the common market (Jones, 1999, p. 27).

On national level, however, the question of unfair trading practices in general and in the food supply in particular were always visible in the political discourse. Among a number of sometimes lofty arguments about food security and the need to protect national heritage raised in the discussion, two questions demonstrate the real issue faced by policymakers. Firstly, if we decide to implement legal measures addressing UTPs, which businesses will benefit and which will lose out? Second key question is what impact this will have on consumers? The latter question was especially pertinent, since EU policies from the beginning have been concentrating on consumer welfare and consumer protection.

It is worth emphasizing that the whole issue has a lot to do with EU and national competition policy and enforcement. It's been generally accepted that excessive intervention in business-to-business transactions and contractual freedom can ossify existing market structures and, as a result, could hamper competition and be detrimental to consumer welfare paying high prices (Department for Business, Innovation & Skills, 2013, p. 1–2 and Daskalova, 2018, p. 21). One may argue that the aforementioned arguments can result at least partly from traditional English reluctance towards the recognition of claims of unfair business conduct between businesses, namely 'severely individualistic view of freedom and sanctity of contract' and 'policy of judicial abstentionism' (see more Tomé Feteira, 2017, p. 84–86). Nevertheless, it is still not clear how UTPs affect consumer welfare (see more Fałkowski, 2017, p. 27–33), likewise there is a lack of empirical research to show the overall harm caused by UTPs (Schebesta, Purnhagen, Keirsbilck and Verdonk, 2018, p. 11), as well as the effectiveness of legal regulation of the UTPs. Hence, if any legal regime of UTPs did

[2] The Treaty Establishing the European Community, see more: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0023 (accessed 7.02.2019).

solve the problem, it is debatable (Daskalova, 2018, p. 9). Furthermore, the difficulty in the decision-making process in relation to the legal framework of UTPs derives from the fact that consumers can be harmed by intervention, whereas the empirical evidence that the issue of extensive bargaining power and economic dependency can be solved by means of the legislation simply does not exist (Department for Business, Innovation & Skills, 2013, p. 1–2; Daskalova, 2018, p. 9). There is also limited evidence how the UTPs can adversely affect the food supply chain too (Fałkowski, 2017, p. 33).

Regarding the entities benefiting from market regulation, the example that should be taken into consideration when discussing the UTPs in the food supply chain, is the EU initiative, namely the Milk Package of 2012. As the EU report informs us, the result of the initiative is 70% better price and 60% more stable price for milk producers (Daskalova, 2018, p. 19[3]). Therefore, we can assume that the Milk Package achieved its primary goal because it resulted in benefits for the milk producers. There is, however, the question pertaining to the consequences for the consumers, who presumably have to pay higher prices, not to mention concerns regarding relations between the consolidation of the milk producers and competition law (Daskalova, 2018, p. 21).

Pressure for an EU-wide system has been building over the years, culminating in a 2018 European Commission proposal to regulate UTPs in the food supply chain by a directive. The first chapter of this book is devoted also to this initiative. After a brief presentation of the European Commission's Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (the Draft),[4] several conclusions have been formulated in respect to the development and consistency of national laws on UTPs.

There is a number of studies that examine the relations in the farming sector as well as the efficacy of the legal measures aiming at balancing or mitigating excessive bargaining power in order to remove the UTPs from the supply chain of food, both in the EU and in the US (see e.g. Schebesta,

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3 Following report from the Commission to the European Parliament and the Council, Development of the dairy market situation and the operation of the 'Milk Package', COM(2016) 724 final {SWD(2016) 367 final}. Retrieved from: https://ec.europa.eu/agriculture/sites/agriculture/files/milk/milk-package/com- 2016-724_en.pdf (accessed 7.02.2019).

4 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0173 (accessed 7.02.2019).

Purnhagen, Keirsbilck and Verdonk, 2018; Scherer, 1997). Nevertheless, in spite of the regulations adopted by the vast majority of the EU member states and the effort being made by the EU institutions, according to the reports produced by the latter, the UTPs in the supply chain of food still exist.[5] The excessive bargaining power or economic dependency are most likely the main reasons of the UTPs phenomenon. However, as one may argue, these characteristics are very difficult to eliminate by legal measures, neither directly addressing the UTPs, nor by contractual law (see e.g. Department for Business, Innovation & Skills, 2013, p. 1–2). Legal instruments addressing UTPs can improve conditions in trade (e.g. in food supply chain), however, as examples of national legislations show, presumably cannot solve the issue of bargaining power (see also Daskalova, 2018, p. 31). As some of the authors argue, the only effective measure that is presumably able to mitigate the consequences of the excessive bargaining power is competition law (see Daskalova, 2018, p. 31–32). This has to be done by ensuring deconcentrated markets in which both buyers and sellers have a choice of contracting partners (Zimmer, 2012). Though, both the EC and the national competition authorities (the NCAs) hesitate to apply competition law in this field (Daskalova, 2018, p. 26–28; Sexton, 2017, p. 12–16), which at least partly results from different understanding of unfair competition and competition law goals (Tomé Feteira, 2017, p. 95–98). Bearing in mind the aforementioned complexity, as one of the studies claims, the perceived occurrence of the UTPs by member state (all the EU) is still ranging from approximately 30% to 60%. More states however, are closer to the higher number (Swinnen and Vandevelde, 2017, p. 46).

In CEE member states the UTPs in the food supply chain certainly occur and are being dealt with privately enforced laws and/or publicly enforced laws. Just like in western Europe, the CEE landscape is a mixed bag of differing legal frameworks on UTPs. It is going to be influenced by the proposed directive, even though its final shape is not known yet, especially that in October 2018 the Special Committee on Agriculture recommended material amendments to the Draft. In particular members voted to broaden the scope of the directive to include all actors in the food supply chain. Negotiations commenced and in December 2018 the agreement on the directive was reached. The EP's negotiating team achieved important modifications to the legislative text, especially on the extension of the scope to agri-food businesses bigger than SMEs (up to a certain

[5] See documents accompanying the Draft.

threshold) and extension of the list of prohibited unfair trading practices (on the original legislative text see Piszcz, 2018, p. 143 et seq.). The Council's Special Committee on Agriculture followed by the EP's Committee on Agriculture and Rural Development approved the agreed text allowing its submission for debate and plenary vote on, respectively, 11th and 12th of March 2019.[6]

Among plenty of arguments referring to the Draft, the vulnerability of legal basis of the future directive, list of practices being chosen as prohibited and static approach (omission of general clauses) seem to be of the greatest importance. Moreover, the mere existence of different approach to UTPs in national legislations as a reasoning of legal intervention in the field, is not satisfactory enough too (Schebesta, Purnhagen, Keirsbilck and Verdonk, 2018, p. 3 and p. 15). Nonetheless, it is worth emphasising that the choice of legal instrument has never been easy for the regulators, both the EU institutions and national legislators and authorities. The regulation and its enforcement should be properly calibrated in order to avoid damage for the market, stakeholders and regulator. On the other hand, lack of action can be damaging for some market participants and regulator's reputation too (Daskalova, 2018, p. 29[7]).

Apart from the western European overview, each of the chapters in this book represent a national report dedicated to one of the eight CEE countries. The reports describe existing legislation aimed at combating the UTPs in the food supply chain and attempt to assess how the proposed directive is going to fit in, since after its adoption there will certainly be a need to re-appraise the concepts adopted by national legislatures. One can expect that in some countries a very significant part of regulatory developments will result from the EU directive.

The tables of contents of all eight reports (Bulgaria by Anton Dinev, Croatia by Jasminka Pecotić Kaufman and Vesna Patrlj, Czech Republic by Josef Bejček, Michal Petr and Petra Pipková, Estonia by Evelin Pärn-Lee, Hungary by Mónika Papp, Lithuania by Raimundas Moisejevas, Valentinas Mikelėnas and Rasa Zaščiurinskaitė, Poland by Monika Namysłowska

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6 See at http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-products/file-unfair-trading-practices-in-the-food-supply-chain (accessed 7.02.2019) and https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0082(COD)&l=en (accessed 8.02.2019).

7 J. Laitenberger (Director-General for Competition, European Commission), 'Accuracy and administrability go hand in hand' (Speech at CRA Conference Brussels, 12 December 2017), http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf (accessed 7.02.2019).

and Anna Piszcz, Slovakia by Ondrej Blažo, Hana Kováčiková and Mária T. Patakyová) are very similar. From the very beginning, the editors wanted to ensure uniformity of the national reports and so they compiled a specific line-up of over a dozen of the most important questions relating to the legal framework for UTPs in the food supply chain. The editors wanted to have answers to such questions all in one report for each country being the subject of research.

Each of the national reports consists of at least four parts. First of all, each national report describes the food supply chain in the country, its specific features, its role in the economy, the level of its concentration or fragmentation among three key groups, that is farmers, food processing companies and retailers. This first part also shows the entire map of laws allowing for public and/or private enforcement against UTPs in the food supply chain, including the evolution of legislation and its significance in political discourse.

Second, each report takes a comprehensive look at details of national legislation, that is both privately enforced laws (such as laws on unfair competition or particular provisions of the Civil Code etc.) and publicly enforced laws. Next, the reports describe the relationship between publicly enforced laws and other acts such as the Civil Code, acts on unfair competition or competition and consumer protection, that is – depending on the national model – coexistence as alternative enforcement tools, overlaps, compatibility, (in)consistencies or contradictions. Key enforcement decisions and case law throughout the reports highlight examples of practice of individual national enforcers. Some reports also assess whether a regulation in place is hard to understand or clearly drafted and poorly or well publicised.

Third, the scope of the substantive law side of publicly enforced law is discussed. In this context, four topics tend to be covered:

– economic agents covered by the law (scope *ratione personae*), that is who bears legal responsibility for meeting requirements regarding fair trading practices and whether there are any legal expressions that mark the threshold between who is subject to the prohibition of the UTPs and who is not,
– scope *ratione materiae* of the law (concept of excessive/superior bargaining power, general prohibition and/or enumerative list of prohibited practices) as well as
– the nature of infringements (prohibited practices) and
– conditions for the application of the law such as fairness and/or public/private interest.

Fourth, each report also delves into the issues of proceedings and an institution in charge of public law enforcement. Procedural issues are strongly represented throughout this part of each report. Considerable emphasis is placed upon the type and principles of proceedings, measures, procedures and remedies provided for under national laws. At the forefront here are questions of decision-making, due process and judicial review. The reports present an entire spectrum of topics related to fines and other sanctions, including whether they are sanctions without possible mitigation or whether enforcement officials have discretion to make decisions in this regard. It is pointed out whether national laws offer a range of options from which the most appropriate sanction can be selected. Sanctions for both infringements of substantive rules and procedural delicts established to enable regulatory bodies to conduct their activities are discussed. The editors believe that the discussion of UTPs (however named in individual countries) cannot take place without considering procedure. In other words, fines and other sanctions cannot be discussed without involving any questions concerning the protection against the wrongful imposition of such sanctions which are provided by procedural rules. Soft enforcement tools and approaches used by enforcement authorities are also mentioned as a means of gaining compliance without formal proceedings. Furthermore, when describing the institutional ('technical') design of public law enforcement, the reports provide valuable insights into what type of enforcement authority has been chosen by a particular national legislature (competition authority or separate agency dedicated to combating UTPs). By this means, provisions according to which a governmental agency is prosecutor, judge and the final authority in UTP cases are discussed by the reports.

The authors eventually attempt to suggest a few lessons *de lege ferenda* by prescribing specific modifying steps that should be taken regarding laws and their application by relevant authorities.

The overview provided by the national reports shows in detail the divergence in the treatment of equivalent unfair trading practices (see Summary). At the same time, we can see where the risk of under-enforcement is notable, which may reduce the incentive for traders to comply with the law. What we consider indisputable is that due to the lack of relevant literature in English, it is relatively difficult for a researcher from a CEE country to examine and compare their respective national solutions on the UTPs with those of our closest neighbours. In that context, it is much easier for us to analyse and compare our legal provisions to the legal frameworks of Western countries. Therefore, we believe that this English-language book will shed invaluable new light on the legal framework

for the UTPs in the food supply chain in CEE countries. We would like to thank all who contributed to this book and our special gratitude goes to the reviewers.

On behalf of the Editors and Authors
Anna Piszcz
and Dominik Wolski

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Dominik Wolski*

Regulating unfair trading practices in selected West European EU member states – in search of equilibrium

I. Introduction

European Union member states have a long history of discussing and regulating unfair trading practices (UTPs) in the food supply chain. In this chapter, regulations in six western EU member states are discussed as background and contrast to efforts undertaken more recently by new member states in the east, described in detail in national reports in this book. The intention is not to analyze particular provisions of private and public law in this respect. The aim is rather to present the approach of particular states to the UTPs and the legal measures that have been applied. The main national enforcement agencies are also mentioned and briefly discussed. The main purpose of this study is to analyze to what extent the selected countries – France, Germany, the Netherlands, Portugal, the United Kingdom and Italy – have developed their public and private regulations of food supply chain UTPs.

The choice of countries for this study was subjective. Nonetheless, in order to draw an appropriately comprehensive picture, it includes states having relatively strong economies, like Germany and France, and those with notably smaller markets, such as Portugal or the Netherlands. Then, the United Kingdom was chosen as a big, well developed economy with a common law legal system, which significantly differs from the continental

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civil law systems (see more about differences between common law and civil law legal systems i.e. August, Mayer and Bixby, 2013, p. 45–50). These differences matter when it comes to the approach to the UTPs, in particular whether they should be regulated by the general contract law or a specific public law. The second characteristic taken into consideration was the presence of a strong food culture, especially associated with some EU member states such as France, Portugal and Italy. This feature strengthens significantly the role of the food industry in the economy, domestically as well as internationally. Each of the three countries export food not only within the EU internal market, but to almost every part the world, too. The difference between southern and northern parts of Europe and their cultural and legal diversity are also a factor.

What should not be missed when discussing UTPs and their legal framework is the European Commission's Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (the Draft)[1]. Obviously, the need for regulation of the UTPs at the EU level has been discussed for a long time, having predominantly political and economic substance, rather than a legal one.[2] Bearing in mind the current development of legal frameworks in CEE and western Europe, the aforementioned initiative announced on 12 April 2018 [3] gets things even more complicated than they were before the draft came out. The last chapter of this paper includes brief observations regarding the aforementioned EU initiative.

II. Between the free market and the need of protection

The appearance of UTPs in the food supply chain was mainly a consequence of a significant concentration of the grocery retail sector that started in the 1970s (Daskalova, 2018a, p. 4, following Gerber, 1998, p. 315) and,

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0173 (accessed 9.02.2019).

2 See i.e. Unfair trading practices in the business-to-business food supply chain (UTPs). Proceedings of the Workshop, Brussels, 24 March 2015, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563438/IPOL_ STU(2015)563438_EN.pdf (accessed 9.02.2019).

3 The report on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (COM(2018)0173 – C8-0139/2018 – 2018/0082(COD)), http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2018-0309&language=EN (accessed 9.02.2019).

as a result, of the change in the balance of power between retailers and producers. Alongside the growing power of big retailers, EU food producers started to complain about the lack of balance, aggressive bargaining power, unfair use of information, etc. (Daskalova, 2018a, p. 1). The UTPs in the supply chain of food were separated from other sectors of the economy and became the subject not only for discussion, but gradually for regulations and competition policy considerations in individual member states.

The approach of individual states to unfair competition in general and unfair trading practices in particular, differ. The vast majority of member states have been adopting specific legislation addressing UTPs in the supply chain of food, starting from Germany in the 1970s, and subsequently through Spain, Portugal, Italy and France in the 1990s (see Daskalova, 2018a, p. 4, following Laudati, 1997; see also: Baarsma and Rosenboom, 2013). As a consequence, in 2018, only 5 out of 28 member states did not have specific regulations addressing UTPs (Daskalova, 2018a, p. 1). This means that only five of the EU member states remained without any form of regulation, legislation or voluntary initiative (e.g. code of conduct) in respect to UTPs (Swinnen and Vandevelde, 2017, p. 42).[4] The UK, even after the announcement of the Green Paper on unfair trading practices in the business to business food and non-food supply chain,[5] demonstrated hesitation, distance and skepticism towards the general idea of a legal instrument addressed directly to the UTPs in supply chain of food and, in particular, towards any attempts to solve the UTPs problem through European harmonization of contract law (see Department for Business, Innovation & Skills, 2013, p. 2).

III. The various ways of dealing with UTPs

Most west European EU members began adopting UTPs laws for the food sector in 1970s. This, however, does not mean their approach is unified or harmonized either in respect to the type of the legal act, nor the branch of law (civil law, public law, administrative law, etc.). On the contrary, in each state many ways have been chosen to regulate the UTPs in their legal systems (see Department for Business, Innovation & Skills, 2013, p. 43).

4 Actually, this number should be four, since in 2016 Poland joined countries having UTPs regulated in a dedicated act. The law came into force in 2017; see http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170000067 (accessed 9.02.2019).

5 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013DC0037 (accessed 9.02.2019).

Some have opted for private law regulations (the Netherlands), others to extend pre-exisiting UTP legislation (Germany) and four of them as having adopted specific legislation (Portugal, France, Italy and United Kingdom) (Department for Business, Innovation & Skills, 2013, p. 44). As a result, even this small sample demonstrates the diversity in the approach to the UTPs. However, it is also true that four out of six states adopted specific regulations directly focusing on the issue of the UTPs.

1. France

To begin with the review of the UTPs regulations adopted by the states from the group included in this paper, French legislation is considered the most stringent among all EU states.

The French regulations addressing food sector UTPs are the most comprehensive, dense and are backed by enforcement by dedicated agencies (see also Department for Business, Innovation & Skills, 2013, p. 46). The most important part – previously restrictive trade practices were governed by the civil law – is now included in the commercial code (mainly vertical relations) (Renda at al., 2014, p. 10; Swinnen and Vandevelde, 2017, p. 47). Additionally, there are also regulations in competition law as well as laws for the agricultural and fishing sector and for the diary sector adopted in 2010.[6] France developed private and voluntary rules addressing the UTPs as well (Renda at al., 2014, p. 10). The enforcement of the aforementioned regulations is carried out by the competition authority (*Autorité de la concurrence*[7]) reporting to the French Ministry of Economy. French authorities have the power that allows not only to investigate in case of receiving confidential complaints from the supplier or *ex officio*, but can also initiate proceedings in criminal court. The latter can in turn impose criminal sanctions such as fines or even imprisonment on a wrongdoer (Swinnen and Vandevelde, 2017, p. 44 and 47). Notwithstanding the above, France will continue to develop the regulations against the UTPs in their various manifestations. Therefore, in 2018 the government proposed new legislation further restricting resale at loss. The French commercial code already prohibits reselling products below purchase price and this new initiative is about to develop these restrictions, though, it can conflict with EU law and jurisprudence (Merten-Lentz, 2018). Paradoxically, the French

6 Loi n°2010-874 du 27 juillet 2010 de modernisation de l'agriculture et de la pêche and Decree No. 2010/1753.

7 http://www.autoritedelaconcurrence.fr/user/index.php?lang=en (accessed 9.02.2019).

example demonstrates meaningful irrelevance between stringent regulations of the UTPs and their occurrence in the supply chain of food. This is because France having the most restrictive legislation of the UTPs in Europe, still notices 39% of perceived occurrence of UTPs in the supply chain of food. This is the number that positions France among several (at least 6 including France) states having approximately 40% of the UTPs' perceived occurrence (from 39% up to 43%) (Swinnen and Vandevelde, 2017, p. 46). As a result the statistics can cause significant doubts in particular when considering that in Poland, a country which until 2017 had neither public regulation of the UTPs nor dedicated authority to deal with this phenomenon, the perceived occurrence of the UTPs is 41% (Swinnen and Vandevelde, 2017, p. 46). This in turn can lead to the conclusion that the stringency and the efficacy of the legislation do not necessarily go hand in hand.

2. The UK

In the UK, despite strong emphasis made by the British government on the contractual freedom and no need of direct regulation of the UTPs in its response to the Green Paper (Department for Business, Innovation & Skills, 2013, p. 1–2), in reality, in Britain such regulations have existed for a relatively long time. In the wake of the investigation carried out in 2001 by the Competition Commission the first *Supermarket Code of Practice* (SCP) was drafted, which regulated relations between the main supermarket and their suppliers. Then, when the SCP appeared to be not effective enough, another code, this time the Grocery Supply Code of Practice (GSCP) was prepared (2009). Starting from 2013, the Grocery Code Adjudicator (GCA) is responsible for the enforcement of the GSCP, watching the relations between the 10 biggest retailers and their suppliers. The GCA's power embraces not only the combination of investigative measures, mediation between retailers and suppliers, but also the possibility of imposing a fine of up to 1% of the annual retailer's turnover in case of a violation of the GSCP (Swinnen and Vandevelde, 2017, p. 44; Department for Business, Innovation & Skills, 2013, p. 9–11). Furthermore, apart from the aforementioned CSCP, in combating the UTPs in the supply chain of food, contract law, unfair competition law and competition law can play the role in a particular case (Department for Business, Innovation & Skills, 2013, p. 3–13). Nevertheless, bearing in mind that the GSCP was crafted directly in order to address the UTPs in the retail sector, it seems to be the primary regulation when discussing the UTPs legal framework in the

UK. This is also the reason why the UK was classified as the country that have specific UTPs legislation (Swinnen and Vandevelde, 2017, p. 44; see also more about the GSCP and its enforcement by the GCA in Renda at al., 2014, p. 60–61). On the other hand, however, the GSCP covers only the biggest retailers having annual turnovers above 1 billion pounds and their direct suppliers (Department for Business, Innovation & Skills, 2013, p. 9). This means in turn that the rest of the relations between retailers and suppliers are out of the scope of the GSCP, falling under contract law, unfair competition law and competition law.

3. Germany

Just as in other west European nations, the legal framework for handling UTPs in Germany is complex, consisting of several interacting legislations. There is no specific legislation addressing UTPs in Germany, but a mixture of regulations covering this area: the competition law (Act Against Restraints of Competition 1957), unfair competition law (Act Against Unfair Competition 2004) and contract law (Civil Code 1896) (Renda at al., 2014, p. 169). As a result, their scopes can overlap in a particular case. Regarding the latter (unfair competition law), its scope of application was extended on purpose, covering not only business-to-consumer (B2C) relations, but B2B as well (Swinnen and Vandevelde, 2017, p. 48; see more about German unfair competition law in Finger and Schmieder, 2005). One of the examples of the German competition law dealing with the UTPs is the development of the concept of the abuse of a dominant position. This is understood to cover 'relative market power' (not only 'absolute market power') and, as a result, 'economic dependence' as one of the main factors causing the UTPs. This means in turn that in Germany the 'superior bargaining power' falls within the scope of the concept of 'economic dependence' (Renda at al., 2014, p. 47–48). Notwithstanding, the AAUC is perceived as the primary legal instrument targeting UTPs (Renda at al., 2014, p. 169). In respect to the public enforcement, the only competent body to initiate *ex officio* investigation or to follow confidential complaints is the German competition authority, which bases its proceedings on the competition law (Swinnen and Vandevelde, 2017, p. 48). As said, German legal framework is another example of various ways that the UTPs can be dealt with. However, German legislation does not include specific regulations of UTPs in the supply chain of food, but consists of a mixture of public legal measures as well as private. The latter are enforceable in civil courts. Therefore, Germany was not qualified as the

country that has specific legislation addressing UTPs in the supply chain of food, but that stretched existing regulations in order to cover the UTPs instead (Swinnen and Vandevelde, 2017, p. 44). Nevertheless, bearing in mind extensive legislation addressing various manifestations of UTPs, the supply food sector included, the aforementioned conclusion is debatable.

4. Italy

Italy is another country classified as one that has specific UTPs legislation and envisages the key role of the competition authority in combating UTPs in the supply chain of food (Swinnen and Vandevelde, 2017, p. 44; Renda at al., 2014, p. 10). At the same time, the perceived occurrence of UTPs equals that in France, namely 39% (Swinnen and Vandevelde, 2017, p. 46). The Italian legal framework of UTPs is recognized as being a combination of industry (food sector) self-regulation and public supervision and enforcement (Renda at al., 2014, p. 22). In 1998, a law on industrial subcontracting was implemented. This legislation was based on the concept of abuse of one party's economic dependence[8] (dealing e.g. with refusal to supply, sudden termination of contract or imposition of unfair contractual conditions). The assessment of such economic dependence is similar to other legislations, such as in Germany or France. The enforcement is shared by ordinary civil courts and the Italian competition authority. The latter, if the case is relevant to the competition and market, can investigate and impose fines for abuses of economic dependence. There is also a distinction, developed over the years by the Italian competition authority, between abuse of dominance and abuse of economic dependence. The latter is interpreted as relating to the parties' obligation to behave correctly and in a good faith in contractual relations, as stated in the Italian Civil Code (Renda at al., 2014, p. 52). Notwithstanding, the specific legislation in the food sector was implemented in Italy in 2012 by Article 62 of the Law Decree of 24.1.2012, No. 1 on commercial (B2B) transactions in the field of cession of agricultural or agro-food products (Decree of Ministry for farming, food and forestry policies). The law imposes a mandatory form of contract and other characteristics that must be included in the contract and a maximum 30-day payment term as well as prohibits unfair trading practices that are listed in it. In case of a violation, the Italian competition

[8] Economic dependence is understood to mean as excessive imbalance between duties and obligations for the parties arising from commercial relations. See Renda at al., 2014, p. 51.

authority can impose fines between 516 and 20,000 EUR and between 500 and 500,000 EUR, depending on the type of infringement (Renda at al., 2014, p. 57 and 186). Interestingly enough, among the states covered by this short study, only Italy and France have at least two things in common when considering UTPs in the supply chain of food – specific legislation and the same percentage of perceived occurrence of UTPs in the supply chain of food (Swinnen and Vandevelde, 2017, p. 46).

5. Portugal

Portugal adopted a law on unfair commercial practices in 2013 (Decree-Law No. 166/2013), which prohibits a list of unfair trading practices (e.g. imposing disproportionate payments or other terms, payments for promotions, retroactive changes in the contract, etc.) and gives the power to monitor any manifestation of such practices in the retail sector to the Agency for Food and Economic Security (ASAE).[9] The aforementioned regulation is in part addressed to all B2B relations, but also includes a special regime concerning the food sector. While the implementation and monitoring of the legislation is up to the ASAE, as the main body to oversee economic activities in the food and non-food sectors, the enforcement of the law (e.g. imposing of fines), is to some extent the joint responsibility of the ASAE and the Portuguese competition authority (Renda at al., 2014, p. 57, 59 and 76). Notwithstanding the above, in Portugal, as in other countries discussed in the study, UTPs are covered by sometimes overlapping legislation, such as competition law, unfair competition law and contract law (Renda at al., 2014, p. 208). There is also sectoral voluntary self-regulation, namely the Code of Good Practices in the Agro-Food Chain, adopted in 2016 (Sérvulo & Associados, 2018). For the reasons mentioned above, in particular after 2013 when Portugal adopted Decree-Law No. 166/2013, this country is classified as having specific regulation addressing UTPs in the supply chain of food (Swinnen and Vandevelde, 2017, p. 44).

6. The Netherlands

The last country discussed in this short study is the Netherlands, which did not decide to implement any specific regulations of UTPs in the food supply chain. As a result, unlike the other states, this is the only one national legal

[9] See more: www.asae.gov.pt/asae-topics-other-languages.aspx (accessed 9.02.2019).

system where the issue of UTPs falls under private law, not being covered by public regulations (Swinnen and Vandevelde, 2017, p. 44; Renda at al., 2014, p. 13). Surprisingly enough, however, the level of perceived occurrence of the UTPs in the supply chain of food is merely 2% higher in the Netherlands that in France (41% vs. 39%) (Swinnen and Vandevelde, 2017, p. 46). This juxtaposition can surprise because France, as outlined above, decided to implement a very dense and comprehensive legal regime addressing UTPs, based on restrictive public legislation and stringent public enforcement. In the Netherlands in turn, the main legislation to cover the UTPs is the Dutch Civil Code of 1992. As a result, the almost only public legislation considering in the context of UTPs is competition law. Apparently, the whole system of UTPs regulations in the Netherlands is complemented by self-regulations covering vertical relations in the food supply chain (Renda at al., 2014, p. 233). Nevertheless, no public law coverage of UTPs in the supply chain of food can be found (Renda at al., 2014, p. 110). This is presumably the reason why the Dutch government claims that civil law is ineffective in combating UTPs (Renda at al., 2014, p. 29), though, bearing in mind the aforementioned comparison between the perceived occurrence of UTPs in France and the Netherlands, the factual grounds of these complaints are dubious.

IV. The recent EU initiative – what is it for?

Even though this short study discusses only a few of the west European EU member states, it goes without saying that in almost all of them, except the Netherlands, the legal framework for regulating UTPs exists. The legislations differ, but usually they consist of public law being enforced by a dedicated authority, private law (contract law and unfair competition law) and various voluntary initiatives. The 'public part' of the legislation is enforced by public authorities, whereas the enforcement of the 'private part' is carried out by civil courts. Therefore, even considering the aforementioned differentiations, it is unquestionable that member states have been doing a lot in the field of law and legal measures aiming at elimination of the UTPs from the food supply chain. If the results are still not satisfactory enough, it is plausible that this is not because of the lack of enough effort or relevant regulations. It is probable that the whole legal effort being made is misdirected because it is very difficult to get rid of such an intangible phenomenon as UTPs. For example, it is hard to grasp the difference between fair and unfair practices, especially in both complex and fast running relations between farmers, distributors and retailers.

On 10 April 2018, the EC announced the proposal of the Draft, that was preceded and accompanied by a number of studies, reports and other documents that discuss the issue of the UTPs in the member states as well as domestic regulations in the field.[10] In respect to this initiative at least two observations are worth noticing. Firstly, for a long time the EC has been demonstrating caution, even resistance, in relation to a legal measure addressing UTPs at the EU level, leaving this field to domestic legislation, mainly private law and competition law. Now this position seems to have changed and the EU institutions decided to begin working on a common legal instrument. Second, it is also worth mentioning that this is not the first EU initiative in the field close to contractual relations. A few years ago a proposal for Regulation of the European Parliament and of the Council on a Common European Sales Law (COM/2011/0635 final – 2011/0284, COD) was announced (the CESL).[11] Similarly to the current Draft, that proposal brought many controversies, mainly because the differences between legal systems and cultures of the EU member states in the field of private law as well as a potential conflict with the principles of subsidiarity and proportionality (Wolski, 2012, p. 809–827). The initiative eventually failed and has never been continued. The current proposal does not result in so many concerns as in the case of the CESL, however, potential inconsistency with legal systems of particular member states and the need of adjustments of domestic regulations are still in place (Daskalova, 2018b; Schebesta, Purnhagen, Keirsbilck and Verdonk, 2018).

Having said that, the inspiration of this chapter is not to analyze details of the Draft, or the particular regulations, that are changing in the course of current works,[12] but to discuss the main assumptions of the proposal. Furthermore, it is interesting to wonder how the implementation of the future directive can affect national regulations of the member states. First and foremost it is worth knowing whether the transposition of the proposal included in the Draft can really make a difference and significantly decrease the occurrence of UTPs in the supply chain of food. Besides, it is also a question if the proposal is consistent with national regulations in general or

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10 See: https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/unfair-trading-practices_en (accessed 9.02.2019).

11 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0635 (accessed 9.02.2019).

12 See e.g. the report of the Committee on Agriculture and Rural Development on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain(COM(2018)0173 – C8-0139/2018 – 2018/0082(COD)).

whether significant changes in national legislation need to be done, provided that the future legal instrument will maintain the 'spirit' of the Draft.

As stated in Article 1 of the Draft (subject matter and scope), the directive stipulates a minimum list of prohibited UTPs in the food supply chain and lays down minimum rules of their enforcement. This legal instrument will apply to UTPs when they occur in relation to sales of food products by suppliers (small and medium-sized enterprises) to buyers (non-small and medium-sized enterprises), as defined in Article 2 of the Draft ('buyer', 'supplier', 'small and medium-sized enterprise', 'food products', 'perishable food products'). Article 3 clause 1 in turn includes a list of prohibited unfair trading practices, such as, in particular, late payments, cancelation of orders of perishable products at short notice, unilateral and retroactive changes of the terms of the supply agreement made by a buyer and supplier's payment for the wastage of food products that occurs on the buyer's premises. The aforementioned practices, which were only outlined above, are unconditionally prohibited by the future directive. This means that they are not permissible under any circumstances, even if agreed by the parties in the sales agreement. The other practices, that are stipulated in Article 3 clause 2 of the Draft are prohibited, unless they were agreed by the parties in the agreement in 'clear and unambiguous' terms. These practices pertain to the return of unsold food products, charges for stocking, displaying or listing of food products and payments for promotions and marketing of food products by the buyer. The aforementioned practices, if agreed in a 'clear and unambiguous' manner in the agreement are permissible in cooperation between the supplier and the buyer. Furthermore, the Draft obliges the member states to designate an enforcement authority at the national level and provides some rules on the confidential complaints regarding unfair commercial practices. These complaints can be submitted by suppliers and producers organizations or associations. Other parts of the Draft are devoted to the powers of the aforementioned enforcement authority and cooperation between the authorities, national rules of combating unfair trading practices that can be more stringent than these in the Draft ('going beyond'), reporting by member states, committee procedures and evaluation of the transposition and entry into force of the envisaged directive. Moreover, while the definition of 'unfair trading practices' is not included in the substantial part of the future directive, it is expressed in its introductory part, namely the first motive. As stated, unfair trading practices are 'practices that grossly deviate from a good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another'.

Considering the main assumptions of the future directive included in the Draft depicted above, a few observations regarding national regulations concerning UTPs in the supply chain of food and their relations to the EU future legal instrument can be pointed out. Firstly, in relation to the list of prohibited practices (Article 3 clause 1 of the Draft), the member states have no choice but to implement at least the same list into their national laws. Since the practices are prohibited *per se* (as such), in some countries, where either there is no such list, or it is, but based on the concept of violation of good commercial conduct, good faith or fair dealing, the existing model should be changed. The strict nature of the aforementioned regulation derives from Article 3 clause 4 of the Draft which prevails the overriding character of the regulations included in Article 3 clause 1 and 2 of the Draft. As a consequence, if the practice occurs, it is prohibited irrespectively of circumstances. Bearing this in mind, the strict nature of the regulation results in strict application, too. This must mean that when assessing if one of the practices from the list exists or not, the aforementioned definition of UTPs stipulated in motives of the Draft does not matter at all. As a consequence, if a prohibited practice occurs, it should be eliminated by the enforcement authority with no exceptions. Moreover, if a member state law allows to apply more flexible measures when assessing the occurrence of UTPs in the food supply chain (for example by considering good faith or good commercial conduct) it should be amended according to the directive and, as a result, become stringent. A member state, according to Article 8 of the Draft, can maintain (if it already exists) or implement (if it does not), even stricter regulations of UTPs by extending the list of prohibited practices included in Article 3 clause 1 of the Draft.

Secondly, Article 3 clause 2 of the Draft gives in turn more flexibility in the assessment of the relations between suppliers and buyers in the context of UTPs. Nevertheless, the criteria of the assessment are obscure and can cause doubts in the practical application of the rules from the future directive. This is because Article 3 clause 2, even though the motives of the directive include a definition of the UTPs, refers to the agreement between the parties and its 'clearness' and 'unambiguousness'. Bearing in mind that some states consider UTPs in the context of fair dealing, good commercial practices or good faith,[13] it can result in doubts in relation to the application of the directive's rules. Should the national authority in

[13] It is worth mentioning however, that some of the member states, like the UK, have also doubts in relation to the definition of the UTPs included in the EU reports, in particular the concept of 'good faith' or 'fair dealing'. See Department for Business, Innovation & Skills, 2013, p. 2.

charge of enforcement refer only to the parties' agreement when assessing the occurrence of UTPs listed in Article 3 clause 2 of the Draft, or it should not, extending the assessment by considering of good commercial customs, good commercial conduct, good faith, etc.? Consequently, bearing in mind the overriding nature of the regulation (Article 3 clause 4 of the Draft), the interpretation of the list of practices should not be extended. Does this mean, however, that once the practice was agreed in 'clear' and 'unambiguous' way, it does not matter whether it is fair or not? This interpretation, though, must mean a significant step back in the development of regulations of UTPs in the vast majority of member states. Fairness and unfairness of a practice in the context of the characteristics mentioned above, such as good commercial conduct and good faith, were always crucial for the final assessment of a particular practice. It seems that should this interpretation not be changed, however, the wording of Article 3 clause 2 in juxtaposition with Article 3 clause 4 of the Draft can cause significant doubts. This becomes even more complicated when we consider Article 8 of the Draft. Should the application of the directive's rules be strict at the national level (or even stricter than the directive as each member state is allowed to do) or, should the definition of UTPs from the motives of the Draft give more flexibility, and, in the end, 'softer' regulation (this, member states are supposedly not allowed to do in the context of the Article 3 clause 4 of the Draft)? Notwithstanding the above, based on the member states' experiences in the field of UTP regulations, it seems to be clear that relying only upon the agreement concluded by the parties when assessing the actual nature of the relations between suppliers and buyers is evidently ineffective. On the contrary, in order to obtain the full picture of the relations between the parties and, in the end, any credible conclusion in relation to the occurrence of the UTPs, all circumstances of cooperation between the parties should be taken into consideration (such as the duration of the cooperation, profitability, business opportunities in the short- and long term, advantages, disadvantages, scope for the distribution of products, etc.). For obvious reasons, what the parties have agreed in the contract should not be ignored to any extent. However, to rely only on what is stated or not in the agreement, it is another extreme. The agreement presents only part of the picture of the relations between a supplier and a buyer. As said, the only sufficient manner to establish the full picture of such relations is to consider all circumstances of cooperation, in particular the advantages and opportunities of mutual, very often long-lasting cooperation. Bearing this in mind, it seems that at this point the Draft significantly misdirects the real problem of UTPs. To demonstrate

such ‘misdirection’, it is sufficient to say that for every experienced lawyer there is not a more unclear concept as ‘clearness’ and ‘unambiguousness’. What is clear and unambiguous for someone, could be completely vague and unclear for someone else. This is what the vast majority of court disputes arising out of contracts are about. This is also the reason why most probably the application of the future UTPs directive rules will not make any real difference in combating UTPs in the supply chain of food.

Regarding the national enforcement authorities (Article 4 and subsequent of the Draft), the vast majority of the EU member states have such bodies, usually the national competition authority. Even based on the six-state sample discussed in this paper, 5 out of 6 already have such an authority empowered to carry out all the activities as stated in Article 6 of the Draft. This means in turn, that to this extent the future UTPs directive does not bring any real change either.

V. Summary and conclusions

Considering the sample of the regulations concerning UTPs in the food supply chain adopted by west European member states against the background of the latest EU initiative (the Draft), several conclusions can be drawn. First and foremost, for the last few decades countries have been developing a number of regulations, both public and private, addressing the issue of UTPs. The states came a long way, which seems to be, as in the title of this paper, a permanent balancing act between the interest of suppliers and buyers as well as between private and public legal measures, with emphasis on the latter. The consumers and their welfare cannot be ignored either. As a result, almost every state designated an authority in order to enforce public UTP regulations, whereas, private law is enforced by civil courts. Obviously, regulations in particular states differ due to differences in legal cultures, however, the whole concept of UTPs as well as the adopted measures do not. The UK example is specific due to the great emphasis on contractual freedom, similarly to the Dutch, where UTPs are primarily the subject of civil law. Nevertheless, even in the UK the regulation of UTPs in the food supply chain is finally enforced by a designated authority (i.e. the GCA). As a consequence, the author believes that neither the aforementioned dissimilarities in the approach to the regulation of UTPs, nor different authorities in charge of the enforcement, are the main reasons of inefficiency in combating the UTPs. Even though we assume that statistics recalled in this chapter indicate inefficiency of the measures adopted in

national laws, maybe the point is that there is no possibility to eliminate UTPs from the food supply chain by the application of legal measures.

The second conclusion is relating to the EU initiative regarding UTPs. Bearing in mind the nature of the proposed regulation, in particular its significant inconsistency with UTP laws developed in individual member states, it is hard to imagine that the transposition of the envisaged directive can make a real difference in combating UTPs. In some member states, contrary to the main purpose of the directive, it can mean a significant step back. This in particular concerns the member states which have well-developed UTP laws and legal practice.

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BULGARIA

I. Introduction

1. Preliminary remarks

This report provides an overview of Bulgaria's recent legislation on abuse of superior bargaining position (ASBP), with a particular focus on the food supply chain.[1] This chain ensures delivery of food and beverages for personal or household consumption and includes producers as well as traders as defined in the Law on Foodstuffs (LF).[2]

A 'producer of food' is any natural or legal person who produces and/or processes foodstuffs, or appears as a producer by using their name, brand or other sign to label food and all accompanying documentation (§1-48 LF). Food producers may operate alone or in groups, which could be partnerships or companies of agricultural and/or food producers under the Law on Obligations and Contracts (LOC) or the Commerce Act, associations under the Law on Legal Persons with Non-Economic Purpose, and cooperatives under the Law on Cooperatives (§1-11 LF). Furthermore, 'trade in foodstuffs' is defined as the process of import, export, storage,

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1 Legislation, decisional practice and case law as of 31 July 2018.

2 Law on Foodstuffs, State Gazette No. 90 of 15 October 1999. The definitions are similar to those in Article 2 of the Proposal for Directive on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0173:FIN (last visited: 30 July 2018).

transport, sale and marketing of foodstuffs, offering food through mass catering or HoReCa (Hotels, Restaurants, Catering) outlets, as well as offering free samples of food to consumers (§1-60 LF). Finally, 'food traders' are those natural or legal persons who engage in trade in food stuffs as previously defined (§1-61 LF).

In light of this dichotomy between produces and traders, Bulgarian law has made significant steps to ensure a better protection of food producers against unfair treatment by food traders. As one author observed, 'in long-term contractual relations characterized by a significant imbalance in the bargaining positions of the parties some undertakings may indeed be in the same position as end consumers *vis-à-vis* their contractual counterpart and should therefore be granted some protection against the risk of exploitation' (Petrov, 2015). The prohibition of ASBP in Article 37a of the Law on Protection of Competition (LPC), introduced with the amendments of July 2015,[3] therefore expanded the scope of existing rules on unfair competition to cover vertical B2B relations. Furthermore, the new regime's 'mixed or hybrid approach' (i.e. voluntary schemes supplemented with credible and effective enforcement)[4] also relies on sector-specific and more flexible rules against unfair trading practices (UTPs) in the food supply chain (Article 19 and Articles 37e–37l LF). This legislative evolution, prompted by political debate and shaped by expert advice,[5] has also drawn the attention of international antitrust scholars (Foer, 2016).

2. Overview of the food supply chain in Bulgaria

Bulgarian agriculture is very fragmented[6] and characterized by: i) relatively small farms (83.2% of holdings are under 2 hectares), and ii) a high contribution to the economy – the primary sector (agriculture, forestry and fishing) accounts for 4.4% of the country's economy and agriculture for 6.8% of total employment. This is higher than the European

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3 Law on Protection of Competition, State Gazette No. 102 of 28 November 2008, as amended State Gazette No. 56 of 24 July 2015.

4 Commission Communication, Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain, COM(2014) 472, available at: http://ec.europa.eu/internal_market/retail/docs/140715-communication_en.pdf (last visited: 30 July 2018).

5 It seems that Bulgaria has combined Option 3 and Option 6 suggested in Evgeniev, Filipov and Gonzalez, 2014.

6 See e.g. CPC Decision No. 1125 of 2 October 2012, *Sector Inquiry into the "Wheat-Flour-Bread" Supply Chain*, available at: https://www.cpc.bg/. See also, Petrov, 2015a, pp. 107–146.

average both in economic terms (1.5% in EU28) and employment (4.3% in EU28).[7] In addition to low market concentration, 'financial derivatives such as futures contract are rarely used, resulting in low risk management and high-price instability in long-term sales of agricultural products' (Petrov, 2015a, p. 109, citing CPC Decision No. 1125 of 2 October 2012, p. 123).

At the intermediate level, food processing is less fragmented and more competitive, involving a large number of SMEs but also local subsidiaries of multinational groups. About 6,000 companies operate in the market, employing nearly 100,000 people and accounting for about 20% of the total industrial output in Bulgaria.[8] Nevertheless, coordination within various branch associations has been investigated and sanctioned on several occasions by the Bulgarian completion authority.[9] Moreover, the lack of adequate storage capacity seems to have further decreased farmers' bargaining power *vis-à-vis* the food-processing companies, leading to price asymmetries and unfavorable, typically unwritten, on-the-spot supply agreements (Petrov, 2015a, p. 109).

Finally, at the retail level, the so-called modern trade (large supermarkets, hypermarkets, and discounters) has been the main market driver over the past 10–15 years.[10] At the same time, Bulgaria has one of the lowest five-firm (CR5) concentration ratios in the EU (36.6% in 2016) (Petrov, 2015a, p. 109), and it is reported that smaller grocery stores and convenience shops remained preferred by most Bulgarians, especially in rural areas (Petrov, 2015a, p. 111–112). Accordingly, even large food retailers have entered the smaller outlet segment (Petrov, 2015a, p. 111–112 citing 2012 GAIN Report: Retail Market Bulgaria[11]). In 2017, this traditional trade channel accounted for BGN 4.96 billion (EUR 2.53 billion) in sales (46%) compared to BGN

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7 European Commission, https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/by_country/documents/cap-in-your-country-bg_en.pdf (last visited: 30 July 2018).

8 GAIN Report: Retail Foods Bulgaria (2018), available at: https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Foods%20Bulgaria_Sofia_Bulgaria_6-29-2018.pdf (last visited: 30 July 2018).

9 See e.g. CPC Decision No. 1150/2007, *Vegetable Oil*, CPC Decision No. 170/2008, *Poultry and Eggs*, CPC Decision No. 650/2008, *Dairy Products*.

10 For example, the share of retail sales of packaged food sold by hypermarkets, large supermarkets, and discounters rose from 42.6% in 2012 to 50.7% in 2017. See Commission Staff Working Document: Impact Assessment of the Initiative to Improve the Food Supply Chain, SWD(2018) 92 final, p. 107, available at: https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF (last visited: 30 July 2018)

11 Retrieved from: https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Market%20Update_Sofia_Bulgaria_1-31-2012.pdf (last visited: 30 July 2018).

5.75 billion (EUR 2.94 billion) in sales through modern trade (54%).[12] The market leader is *Kaufland* (18% market share, 58 outlets), followed by *Metro* (13 outlets), *Lidl* (86 outlets), *Billa* (120 outlets), *Fantastico* (41 outlets), and hundreds of smaller retailers.[13] Overall, despite some challenges in 2015–2016 following the exit of *Penny Market* and the insolvency of *Carrefour Bulgaria* and *Piccadilly*, food retail is expected to maintain moderate growth in the coming years.[14]

3. Map of relevant laws

Historically, prohibition of unfair competition has always been part of the Bulgarian legislation on protection of competition.[15] Article 29 LPC defines unfair competition as 'any action or omission when carrying out economic activity, which is contrary to good faith commercial practices and damages or may damage the interests of competitors'. This general prohibition is followed by rules against six specific forms of unfair competition (Articles 30 to 37): 1) damaging good name and trade reputation of competitors, 2) misrepresentation, 3) misleading and comparative advertising, 4) imitation, 5) unfair soliciting, and 6) unfair use of trade secrets. As one author points out, even though 'the general prohibition is subsidiary to the specific rules, a violation of the latter must exhibit the general features of the former' (Petrov, 2015a, p. 114).

Against this background, it was unclear whether UTPs[16] involving suppliers and distributors fell outside the scope of LPC. Both the Commission for Protection of Competition (CPC) and the review courts dismissed the view that Article 29 LPC applied only to direct competitors (Petrov, 2015a,

12 GAIN Report: Retail Foods Bulgaria (2018), *op. cit.*, note 8.

13 *Id*. According to this report, the overall number of food retailers in the country is 41,872, of which 3,683 are modern-trade outlets and 38,219 are traditional grocery retailers.

14 *Id*.

15 Law on Protection of Competition (LPC 1991), State Gazette No. 39 of 17 May 1991, Law on Protection of Competition (LPC 1998), State Gazette No. 52 of 8 May 1998, and currently Law on Protection of Competition (LPC 2008), State Gazette No. 102 of 28 November 2008.

16 UTPs can broadly be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing, and are unilaterally imposed by one trading partner on another, Commission Communication, Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain, COM(2014) 472, available at: http://ec.europa.eu/internal_market/retail/docs/140715-communication_en.pdf. (last visited: 30 July 2018). See also recital 1 to the Proposal for Directive on unfair trading practices in business-to-business relationships in the food supply chain, *op. cit.*, note 2.

p. 114, citing CPC Decision No. 345/2010 and CPC Decision No. 375/2010 in which the CPC took the view that 'where proceedings are initiated without a petitioner (*sua sponte*), there is no need to analyse competitive relations in order to establish the existence of unfair competition'). However, ever since Bulgaria joined the EU in 2007, local competitors and suppliers would often complain of international grocery chains, which prompted heated political debates in the early 2010s.[17] Furthermore, a sharp increase in commodity prices in 2007 and 2011 resulted in even higher prices in the agri-food sector. At first, the CPC issued an advisory opinion at the request of the Ministry of Finance in which it reiterated that no specific legislation was needed and any problems in the food supply chain should be resolved through mediation within the trade associations.[18]

In 2010, the Ministry of Finance and the Ministry of Economy set up a joint task group to reconsider the matter, which concluded that retailers with significant market power distorted competition by abusing suppliers' economic dependence. Self-regulation was dismissed as inadequate, and a draft bill to amend the LPC was introduced in June 2012 (Petrov, 2015a, p. 116). In a new advisory opinion, the CPC approved the main lines of the proposed legislation while criticizing other points, namely the definition of significant market power by reference to the capacity to impose unfair trading conditions, which could blur the line between *having* and *abusing* significant market power[19] As also reported elsewhere, the major change in the draft bill consisted in introducing the concept of 'significant market power' (distinct from monopoly and dominant position), hence enlarging the scope of prohibited unilateral conduct under Article 21 LPC (Bulgaria's equivalent of Article 102 TFEU).[20]

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17 This is hardly surprising since it is reported that intra-EU trade accounts for about 20% of the total of food and beverage production in the EU, and that at least 70% of all agricultural products are destined to another EU Member State (Report of the High Level Forum for a Better Functioning of the Food Supply Chain, December 2012). Taken alone, the food and beverages industry is the Union's biggest manufacturing sector, in terms of employment (4.25 million jobs) 20, turnover (€1,017 billion) and added value (€203 billion, or 12.9% of EU manufacturing) 21. SMEs account for 99.1% of companies in the food and drink sector (Report of the High Level Forum for a Better Functioning of the Food Supply Chain, October 2014).

18 CPC Decision No. 495/201. See also Petrov, 2015a, p. 115.

19 CPC Decision No. 716 of 27 June 2012.

20 Following the CPC advisory opinion, the draft bill defined 'significant market power' as being held by an undertaking without a dominant position in the relevant market, but whose market share, financial resources, capacity to enter a market, level technological development, and economic relations with other undertakings could prevent competition in that market, provided that its suppliers and buyers are dependent on it. The last

Due to political instability and snap general elections in 2013 and 2014, neither the June 2012 Draft Bill nor its successor of March 2014 would become effective legislation. However, the latter served as a model for the November 2014 Draft Bill amending the LPC, which was eventually adopted in July 2015, although with some significant modifications. While the draft bill referred to the European Commission's Green Paper, which identified seven most common types of UTPs,[21] and also acknowledged that it had drawn on legislation and practice in Czechia, Germany, and the UK, it introduced: i) a new prohibition against abuse of significant market power, as a third form of anticompetitive unilateral conduct along with abuse of monopoly position (Articles 19 and 21 LPC) and abuse of dominant position (Articles 20 and 21 PLC); ii) the concept of 'significant market power' as a supplement to 'dominant position' in all substantive provisions governing unilateral conduct and merger control; iii) a new duty for the CPC to assess (as part of its competition advocacy powers) the general terms and conditions (GTCs) and proposed amendments thereof of all undertakings with aggregate annual turnover of BGN 50 million (approx. EUR 25 million); iv) an obligation, subject to pecuniary sanctions, for all undertakings with aggregate annual turnover of BGN 50 million (approx. EUR 25 million) to submit their GTCs to the CPC; v) specific requirements for supply agreements concluded by food retailers with aggregate annual turnover of BGN 50 million (approx. EUR 25 million).[22]

Finally, on 9 July 2015, the LPC and the LF were amended as follows: i) a general prohibition in Article 37a LPC against abuse of superior

element – *economic dependence* of suppliers and buyers – was highlighted by the CPC as the defining, strictly economic, criterion to distinguish 'significant market power' from dominant or monopoly position under Article 21 LPC. This analysis seems to proceed *a contrario* from the classic definition of dominance in *United Brands*. In other words, according to the CPC, since a dominant undertaking was defined by 'the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers' (Case 27/76, para. 65, emphasis added), the lower threshold of 'significant market power' would apply where suppliers and buyers *depend* on a given undertaking in the relevant market. Additionally, the concept of 'significant market power' was deemed consistent with Article 3(2) of Regulation 1/2003 and similar concepts under the laws of France, Germany, Greece, Portugal, Latvia, Hungary, and Ireland. See also Petrov, 2015a, p. 116.

21 Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013) 37, pp. 17–21, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0037:FIN:EN:PDF (last visited: 30 July 2018).

22 Draft Bill No. 454-01-36 of 6 November 2014, available at: http://parliament.bg/bills/43/454-01-36.pdf (last visited: 30 July 2018).

bargaining position (instead of the earlier 'significant market power'), which comes right after the provisions against unfair competition (Articles 30–37 LPC),[23] ii) a list of prohibited clauses in food-supply agreement (Article 19 LF), iii) creation of a National Consultative Council for the Better Functioning of the Food Supply Chain,[24] which includes members of the Ministry of Agriculture, Food, and Forestry, the Ministry of Economy, the Executive Agency for Supporting SMEs, the professional organizations of food producers, and the branch associations of food retailers (Article 37e LF), and v) a new mediation procedure through a conciliation committee (Article 37j–37l LF).[25]

II. Detailed description of national legislation

1. Privately enforced law

Generally, contracts between merchants, including food-supply agreements, are governed by the Commerce Act.[26] Also, retail operations are not limited to a specific legal form – sole proprietors, partnerships, companies, cooperatives participate without restrictions in the food supply chain (Petrov, 2015a, p. 123). On the other hand, the Commerce Act does not regulate UTPs between businesses, except the prohibition of limited liability for late payments which may constitute an abuse of the creditor's interests and violate 'good morals' (*bonnes mœurs*), or good commercial practices.[27] For all situations and causes of action outside the scope of the Commerce Act, the parties may rely on the general (civil) Law on Obligations and Contracts (LOC)[28] and specific legislation such as the LF and LPC.

Private actions for nullity (declaration of voidness) can be based on either Article 19 LF or Article 37a LPC (discussed below) in conjunction with the general provision in Article 26 LOC. This Article provides for

[23] The change from 'abuse of *significant market power*' to 'abuse of *superior bargaining position*' is not just a matter of semantics and is discussed in Section III.1 below.

[24] This consultative body seems to be modelled on the High Level Forum for Better Functioning Food Supply Chain set up by the European Commission, Commission Decision of 30 July 2010, 2010/C 210/3, and Commission Decision of 1 June 2015, 2015/C 179/03.

[25] Law amending the Law on Protection of Competition, State Gazette No. 56 of 24 July 2015, available at: http://www.parliament.bg/bg/laws/ID/15042 (last visited: 30 July 2018).

[26] Commerce Act, State Gazette No. 48 of 18 June 2018.

[27] Article 309a of the Commerce Act.

[28] Article 288 of the Commerce Act.

nullity of all contracts that run against the law and violate good practices. However, it should be born in mind that Article 37a LPC applies to 'every action or omission', that is not only contractual obligations, and also that it is not sector specific. By contrast, Article 19(2) LF contains an explicit nullity clause for food-supply agreements that contain one or more of the prohibited terms and conditions in Article 19(1) LF: i) clauses which ban or restrict a party from offering or purchasing goods or services to or from third parties; ii) clauses which ban or restrict a party from offering the same or better trade conditions to third parties; iii) sanctions for providing the same or better trade conditions to third parties; iv) unilateral amendments, unless expressly agreed by both parties;[29] v) payments for services that have not been actually provided; vi) shifting unjustified or disproportionate risk to one of the parties; vii) payment deadlines in excess of 30 days following the invoice date or the receipt of an equivalent request for payment;[30] viii) clauses which ban or restrict a party from transferring receivables to third parties.[31]

Actions for damages resulting from ASBP in the food supply chain can be based on Article 37a LPC (discussed below) in conjunction with Article 105 LPC. The latter provides that:

(1) For damages caused as a result of committed infringements of this Law, the person at fault shall owe indemnity.

(2) Entitled to indemnity in full is every natural persons or legal person who have suffered damages, even where the infringement has not been directed against them.

(3) Claims for indemnity shall be lodged under the procedure set forth in the Civil Procedure Code.

(4) A decision of the Supreme Administrative Court which has entered into force, and which upholds a decision of the Commission [for Protection of Competition] finding a committed infringement of this Law, shall be binding upon the civil court as to whether there has been an infringement and who committed it. A decision of Commission [for Protection of

[29] Similar provisions are adopted in Latvian and Lithuanian legislation. See Commission Staff Working Document: Impact Assessment of the Initiative to Improve the Food Supply Chain, SWD(2018) 92 final, p. 158, available at: https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF (last visited: 30 July 2018).

[30] In line with Article 3(3)(b) of Directive 2011/7/EU on combating late payment in commercial transactions Text with EEA relevance, OJ L 48, 23.02.2011, p. 1.

[31] Comp. Article 3 of the Proposal for Directive on unfair trading practices in business-to-business relationships in the food supply chain, *op. cit.*, note 2.

Competition] which has not been appealed, or when the appeal against has been withdrawn, shall be binding upon the civil court as to whether there has been an infringement and who committed it.

Furthermore, the new Article 106 LPC specifies that damages are to be compensated in full:

(1) Indemnity in full shall put the person who suffered damages in a position as if competition law had not been infringed.
(2) Indemnity in full covers the right to compensate actual damages and lost profits as well as interest.
(3) Indemnity in full may not be excessive compared to the damages suffered.

It is noteworthy that compensation is due and may be requested in B2B and B2C relations to the extent that the parties fulfil the definition of undertaking within the meaning of the LPC.

In addition to the private actions above, the 2015 amendments to the LF introduced a new mediation procedure before a conciliation committee. The committee is a body under the authority of the Minister of Agriculture, Food, and Forestry, and which consists of a chairperson appointed by the minister and members nominated by those professional organizations of food producers and branch associations of food retailers, which participate in the National Consultative Council for the Better Functioning of the Food Supply Chain (Article 37z LF). The procedure before a three-member panel of the committee aims to assist the parties in finding out-of-court settlements of disputes between food producers and retailers, including compliance with good practices[32] and avoiding UTPs[33] (Article 37j LF). Within three months of lodging a written complaint with the committee, the parties receive a draft settlement agreement, which they have ten days to accept and make it definitive (Article 37l LF).

[32] 'Good practices' are defined as the system of basic hygiene and technological rules that apply to food production and trade in foodstuffs in order minimize the risk of contamination (§1–14 LF).

[33] 'Unfair competition' is defined as every act or omission in producing and/or trading with foodstuffs which runs against good practices and harms or may harm the interests of competitors in their relations with one another or with consumers (§1–35 LF).

2. Publicly enforced law

As seen above, the key provision for public enforcement against ASBP is Article 37a LPC:

(1) *Every act or omission of an undertaking with a superior bargaining position shall be prohibited where it is in conflict with good faith business practices and harms or may harm the interests of the weaker contracting party and the consumers. Unfair shall be acts or omission which do not have objective economic grounds, such as unjustified refusal to supply or purchase goods or services, imposition of unreasonably burdensome or discriminatory conditions, or unjustified termination of business relations.*

(2) *The existence of a superior bargaining position shall be determined in view of characteristics of the relevant market's structure and the particular transaction involving the undertakings concerned, also taking into consideration the level of dependence between them, the nature of their business and the difference in the scale thereof, the likelihood of finding an alternative trade partner, including the existence of alternative supply sources, distribution channels and/or customers.*

This provision aims to strike a balance between principle-based and rule-based approaches to regulating UTPs. While the former, embodied by the general prohibition in the first sentence of Article 37a(1), leaves more enforcement discretion and can quickly address new forms of UTPs, the latter, illustrated by the enumerative list of UTPs in the second sentence of Article 37a(1), provides greater legal certainty, which is particularly needed in vertical B2B transactions. Article 37a(2) is similarly structured as it provides both general and specific criteria to determine a superior bargaining position. Another noteworthy detail: while the general prohibition in (1) and the specific criteria in (2) seem closer to unfair competition rules, the general criteria in (2) and the examples of UTPs in (1) parallel the rules on abuse of dominance.

3. The relationship between public enforcement law and other acts

In a nutshell, the relationship Article 37a LPC, which can be enforced both publicly and privately, and the privately-enforced Article 19 LF is one of complementarity and exclusivity.

First, they complement one another, the former applying to ASBP across the board while the latter targeting UTPs in the food supply chain alone. Moreover, as evidenced by the legislative history of Article 37a LPC, the prohibition of ASBP is intended to regulate trade practices in the grey area between abuse of dominance and unfair competition.[34] As pointed out by the European Commission, although competition (antitrust) rules may capture certain UTPs in a B2B setting, they ultimately pursue a different goal, which is protecting competition on the market.[35] On the other hand, unfair competition rules classically focus on horizontal B2B relations and often overlook the B2C implications of imbalances along the supply chain. While retailers as well as suppliers can be victims of UTPs, it is also necessary to consider consumer welfare, in which case antitrust concepts and analytical tools could be particularly helpful.[36]

Second, as the CPC made it clear, the complementarity between Articles 37a LPC and 19 LF has created a comprehensive and exclusive regime to address UTPs in the food supply chain. Therefore, new rules seeking further protection of Bulgarian food producers by imposing shorter deadlines (10 days) for paying for perishable foods would create unnecessary legal and economic restrictions.[37]

4. Key enforcement decisions and case law

As of July 2018, the CPC has enforced the prohibition of ASBP on 17 occasions – 8 decisions in 2016, 8 more in 2017, and 1 decision in 2018. Only four cases involved grocery chains and just one decision resulted in pecuniary sanctions.

In an *ex officio* case against Lidl Bulgaria, which was triggered by a complaint, the CPC found no violation of the new Article 37a LPC, since the alleged abuse took place before the prohibition became effective.[38]

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34 Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain, *op. cit.*, note 2.

35 Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, *op. cit*., note 21, p. 10.

36 See III.1 below.

37 CPC Decision 228 of 28 February 2017, *Advisory opinion on the proposed amendments to the Law on Foodstuffs (No. 654-01-126 of 18 October 2016)*.

38 CPC Decision No. 850 of 14 October 2016, *Lidl Bulgaria*. This non-infringement decision was followed by a private action before the Sofia District Court which resulted in reputational damages and attorney fees for Lidl Bulgaria (Sofia District Court, Decision No. 346781 of 23 February 2018).

Another case involving Lidl Bulgaria likewise led to a non-infringement decision.[39] This time, however, the competition authority proceeded to a detailed analysis of all elements required to prove ASBP. First, it was established that Lidl did not have a superior bargaining position *vis-à-vis* Prisma Lux, a licensed food-voucher operator, and second, a 3-month notice from the grocery chain ruled out unfair or abusive termination of contract between the two undertakings.

By contrast, another leading food retailer, Kaufland Bulgaria, was fined EUR 80,000 (approx.) for unilaterally, and without any economic justification, imposing reduced supply prices *via* rebates and discounts for alcoholic beverages provided by its long-time supplier Keti-94. Moreover, Kaufland coerced its trading partner by suspending the retail sale of its beverages in 2015. Since Keti-94 lacked the financial resources to switch to an alternative distribution channel, and consequently supplied almost exclusively Kaufland at prices below production costs (the lowest compared to other Kaufland distributors) while the grocery chain was making higher profits, the latter was found to have had a superior bargaining position. It also abused the economic dependency of Keti-94 by abruptly terminating their long-term contractual relations, which was deemed severe and contrary to good faith, and justified a fine of about 7% of Kaufland's annual turnover in sales of low-end alcoholic beverages.[40]

Finally, the CPC found no infringement of Article 37a LPC in a case against food processing company United Milk Company (UMC) brought by a supplier of plastic yoghurt pots. Considering the fact that the supplier did not produce the pots but purchased them from the actual manufacturer, the CPC examined the individual relationship between UMC and the said supplier. It took the view that both undertakings are interdependent and that the supplier was in fact in a better position since it had more than 200 alternative trade partners in the relevant market. Therefore, UMC lacked superior bargaining power, a *sine qua non* condition for ASBP.

39 CPC Decision No. 852 of 14 October 2016, *Prisma Lux v. Lidl Bulgaria*.

40 CPC Decision No. 1111 of 20 December 2016, *Keti-94 v. Kaufland Bulgaria*. See Edreva, 2017. At the time of writing, this decision is still under appeal before a three-judge panel of the Supreme Administrative Court (Case 920/2017).

Other sectors where the CPC applied Article 37a LPC include energy,[41] utilities,[42] television,[43] telecommunications,[44] healthcare,[45] air transport,[46] funeral services,[47] and software.[48]

Overall, the CPC decisional practice so far evidences an effort to clearly define the concepts included in the prohibition of ASBP, especially with

41 CPC Decision No. 365 of 26 May 2016, *Bright Engineering v. Siemens Bulgaria*. In this case, the first under Article 37a LPC, the CPC found that Siemens, although not having a dominant position in the relevant product market, did have a superior bargaining position since it was the only supplier of spare parts for the steam turbines maintained by the complainant. The refusal to supply those parts was contrary to good faith and economically unjustified in the context of long-standing commercial relations. The dependent undertaking suffered damages since it was unable to fulfil its maintenance contracts, which could also harm end-users, as noted in the decision. As a result, the CPC imposed a mid-range fine of EUR 17,900 (approx.). See Edreva, 2016.

42 CPC Decision No. 1110 of 20 December 2016, *Treger v. Sofia Water* (non-infirngement decision, since the alleged infringement took place prior to introducing Article 37a in the LPC).

43 CPC Decision No. 220 of 28 February 2017, *Virginia Air N v. BTV Media Group and NOVA Broadcasting Group* (infringement decision and a total of EUR 1,500,000 (approx.) of fines for violating Article 37a); CPC Decision No. 1345 of 23 November 2017, *Piero-97 v. BTV Media Group* (non-infringement decision, no violation of Article 37a LPC since BTV Media did not have superior bargaining power); CPC Decision No. 1346 of 23 November 2017, *Krakra et al. v. NOVA Broadcasting Group* (non-infringement decision, no violation of Article 37a LPC since NOVA did not abuse its superior bargaining position by terminating contracts for advertisement time).

44 CPC Decision No. 630 of 15 June 2017, *Nordelink Bulgaria v. Skat* (non-infringement decision, no violation of Article 37a LPC since Skat was found to lack superior bargaining position).

45 CPC Decision No. 804 of 20 July 2017, *Pavlin Chaushev v. "Dr. Stefan Cherkezov" Hospital* (non-infringement decision, no violations of Article 37a LPC since complainant was a natural person and did not fulfil the definition of 'undertaking' within the meaning of the LPC); CPC Decision No. 631 of 14 June 2018, *Remedy Trading v. Amgen Bulgaria* (non-infringement decision, no violation of Article 37a LPC since Amgen did not wholesale pharmaceutical products nor did it have superior bargaining position).

46 CPC Decision No. 941 of 10 August 2017, *Argus Travel International v. Bulgaria Air* (non-infringement decision, no violation of Article 37a since Argus Travel, as an accredited IATA ticketing agent, was not in a direct contractual relation with Bulgaria Air; both parties were merely complying with IATA regulations).

47 CPC Decision No. 1279 of 9 November 2017, *Beta Traur v. Municipality of Lovech* (non-infringement decision, no violation of Article 37a LPC since the parties did not engage in direct dealing within the meaning of that provision).

48 CPC Decision No. 1386 of 30 November 2017, *Biosoft v. National Bureau for Legal Aid* (non-infringement decision, no violation of Article 37a LPC since the Bureau, as a public authority, fell outside the scope of the definition of 'undertaking' within the meaning of the LPC).

respect to existing competition rules such as abuse of dominance or unfair competition. In this regard, the reader should also refer to the available summaries of several sector inquiries and antitrust cases concerning the food supply chain in Bulgaria.[49]

III. Nature of infringement and scope of public enforcement

1. Nature of the prohibited abuse

Since abuse of superior bargaining position is now part of the rules against unfair competition, an infringement of Article 37a LPC is regarded as a form of tort, as it requires harm to the legitimate interests of the weaker party in commercial negotiations. However, the risk of placing too much emphasis on protecting competitors rather than consumers and SMEs has been criticized, as well as the systematic place of this prohibition in the LPC (Markov, 2016[50]).

At the same time, replacing the initially proposed antitrust concept of 'significant market power' with the unfair competition notion of 'superior bargaining position' in the adopted amendment did not cut all ties with competition rules aiming at preventing consumer harm. This follows from the requirement in Article 37a LF that the prohibited unfair act or omission has no objective economic grounds and also impairs the interests of consumers. Also, the existence of superior bargaining position is to be determined in part by the same methodology the CPC uses for assessing market dominance.[51]

Moreover, one of the specific criteria used to establish the superior bargaining position – lack of alternative supply sources, distribution channels and/or customers – might already indicate problems with effective competition in the relevant market from an antitrust standpoint. By the same token, a difference in the bargaining positions significant enough to enable one party to unilaterally restrict the decision-making autonomy of the weaker party could also prevent it from competing effectively against other suppliers of the same product (Petrov, 2015). As for the interests

[49] OECD, Competition Issues in the Food Chain Industry, DAF/COMP(2014)16, pp. 92–96, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2014)16&docLanguage=En (last visited: 30 July 2018).

[50] The author likewise criticizes the initial proposal to regulate 'abuse of significant market power' as part of the rules against abuse of monopoly and dominant position.

[51] See III.2 below.

of consumers, they could be adversely affected if, as the CPC held in *Kaufland*, imposing lower prices on a weaker supplier does not translate into equally lower prices for consumers.[52] In that case, the undertaking enjoying a superior bargaining power would be unfairly making profits solely at the expense of its weaker trading partner, which could not possibly have an objective economic justification within the meaning of Article 37a(1).[53]

2. Assessment of superior bargaining position

The concept of 'superior bargaining position' in Article 37a(2) LPC requires to be assessed in light of both general and specific criteria (Markov, 2016).[54] First is the assessment through market definition and analysis of the existing competitive constraints and market position of the undertakings concerned. At this stage, the CPC needs to use its Methodology for Assessing and Defining the Market Position of Undertakings in the Relevant Market. Arguably, however, this assessment need not be as thorough as that required for determining a dominant position (Markov, 2016). While a finding of such a position will normally trigger the application of Article 21 LPC (which prohibits abuse of market dominance), considering the ability to act independently, or as the CPC put it the capacity to 'determine its pricing policy by taking into account solely its own business interest'[55] might not be enough to rule out superior bargaining position.

As for the specific criteria to determine a superior bargaining position, they suppose a more detailed analysis of the relationship, legal or factual, between a supplier and a retailer. Most importantly, the level or degree of economic dependence will have to be established on a case-by-case basis and for every individual agreement involving the same undertakings.[56] Secondly, the nature and scale of their businesses needs to be considered, but again through the lenses of a particular agreement at issue. Finally,

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52 CPC Decision No. 1111 of 20 December 2016, *Keti-94 v. Kaufland Bulgaria*.

53 See III.3 below.

54 Comp. Bulgaria's approach to defining 'superior bargaining position' with that of e.g. Slovenia (based on the volume of sales) or Germany (only when economic dependence involves SMEs as defined elsewhere), Commission Staff Working Document: Impact Assessment of the Initiative to Improve the Food Supply Chain, SWD(2018) 92 final, p. 155, available at: https://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF (last visited: 30 July 2018).

55 CPC Decision No. 1111 of 20 December 2016, *Keti-94 v. Kaufland Bulgaria*. See Edreva, 2017.

56 See e.g. CPC Decision No. 630 of 15 June 2017, *Nordelink Bulgaria v. Skat*.

a superior bargaining position is evidenced by the extent to which the dependent undertaking may switch to alternative suppliers, distributors, and/or customers. It is suggested that this third criterion is examined against the backdrop of the relevant market and not within an individual relationship between the undertakings concerned (Markov, 2016).

While differences in bargaining power are quite common, especially in vertical relations, and having a superior bargaining position is not prohibited, its abuse may constitute an UTP.[57] As already seen, Article 37a(1) LPC sets out a general prohibition of acts or omissions which run against fair business practices and harm or may harm the interests of a weaker party to a transaction or consumers. It also contains a non-exhaustive list of prohibited (unfair) practices which do not have objective economic grounds, such as unjustified refusal to supply or purchase goods or services, imposition of unreasonably burdensome or discriminatory conditions, or unjustified termination of business relations.

At the same time, some authors point out that it is not unlikely that 'certain contractual terms and practices that reduce the benefit of one of the parties could ultimately benefit consumers, if the stronger party passes the advantages 'extorted' from the weaker party down the supply chain – for example, a reduction of procurement prices contributing to reduction of retail prices should not be regarded as a violation' (Petrov, 2015). Therefore, it has been suggested by reference to the rules on abuse of dominance (Article 21 LPC) (Markov, 2016), and also evidenced by the CPC decisional practice, that Article 37a LPC should only be enforced against UTPs that may ultimately harm consumer welfare in the long run.

3. Conditions for applying the prohibition of ASBP

Under Article 37a LPC, the prohibition against abusing a superior bargaining position consists of four cumulative elements which require a fairness assessment on a case-by-case basis:

(i) existence of a specific, individual relationship (contractual or pre-contractual) between two independent undertakings within the meaning of the LPC;
(ii) imbalance in the respective bargaining positions, which results in a superior bargaining position;

[57] Commission Communication COM(2009) 591: A Better Functioning Food Supply Chain in Europe, available at: http://ec.europa.eu/economy_finance/publications/pages/publication16061_en.pdf (last visited: 30 July 2018).

(iii) conduct of the party having a superior bargaining position which is inconsistent with good faith business practices.[58] Such acts or omissions lack objective economic grounds and include, *inter alia*, unjustified refusal to supply or purchase goods or services, imposition of unreasonably burdensome or discriminatory conditions, or unjustified termination of business relations. Although merely examples, these three types of prohibited conduct exhibit similarities with the abuses under Article 21 LPC (and Article 102 TFEU). The first and the third – refusal to supply/purchase and unjustified termination of business relation could affect (upstream) market structure and have 'exclusionary nature', whereas the second type of practice – imposing excessive or discriminatory, seems to have 'exploitative nature' (Markov, 2016).

(iv) actual or potential harm to legitimate interests of the weaker party that may also harm consumer welfare. This condition differentiates ASBP from (classical) unfair competition rules, the protected legitimate interests being not only those of competitors (horizontal B2B relations) but those of the roader category of 'weaker party' (both vertical and horizontal B2B relations) and consumers.[59] Harm to the legitimate interest is likewise understood broadly and could take the form of e.g. significant reduction of the affected undertaking's regular customers as a result of the action or omission by the undertaking with superior bargaining power.

4. Economic agents covered by the law (*ratione personae*)

Although the prohibition against the abuse of superior bargaining position was adopted in order to address UTPs in the food retail sector, it is not limited to economic operators in that sector alone. In fact, most CPC decisions to date have addressed alleged violations in industries as diverse as energy, utilities, television, telecommunications, healthcare, air transport.[60] It should also be kept in mind that Article 37a LPC applies only to undertakings as defined in the LPC.[61]

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58 'Good faith business practices' are defined as the rules on market conduct that result from legal or customary trade relations and comply with good morals (§1–2 LPC).

59 'Consumer' is defined as every natural person who acquires goods or uses services that are not intended for commercial or professional activity, as well as every natural person involved in a transaction outside the scope of their commercial or professional activity (§13-1 Law on Protection of Consumers).

60 *Supra* notes 40–50.

61 CPC Decision No. 804 of 20 July 2017, *Pavlin Chaushev v. "Dr. Stefan Cherkezov" Hospital* (non-infringement decision, no violations of Article 37a LPC since complainant was

As for the UTPs prohibited under Article 19 LF, they are applicable along the whole food supply chain, as there no limitations by size (e.g. large businesses only) or position (e.g. retailers only).

IV. Public enforcement institution and proceedings

1. Institution in charge of public enforcement

Prohibition of the abuse of superior bargaining position is enforced by the CPC, an independent administrative authority, accountable to the Bulgarian Parliament, and having general, cross-sectoral competence. Like most of its ECN counterparts, the CPC has a full set of enforcement powers, including investigative, decision-making, injunctive, and sanctioning powers (Article 8 LPC). If (or when) the Proposal for Directive on unfair trading practices in business-to-business relationships in the food supply chain[62] is adopted and the CPC is designated pursuant to Article 4 thereof, it will also have to apply what is now Article 19 FL (or that provision be moved to the LPC). Alternatively, having separate authorities for enforcing rules against UTPs in food and non-food supply chains could create problems of coordination, similar to those often occurring between competition authorities and sectoral regulators (utilities, telecoms, etc.).

2. Type and principles of proceedings

Proceedings before the CPC are administrative in nature, subject to judicial review by the Supreme Administrative Court, and mirror those before the European Commission and most NCAs across Europe. Unlike other national legislations, however, the LPC includes both general (Article 38–69 LPC) and specific procedural rules depending on the substantive rules enforced – anticompetitive agreements and abuse of dominance (antitrust), control of concentrations, unfair competition, sector inquiries, and competition advocacy. Since ASBP is now part of the rules on unfair competition, the relevant procedure is set out in Articles 94–98 LPC,

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a natural person and did not fulfil the definition of 'undertaking' within the meaning of the LPC). 'Undertaking' is defined as every natural or legal person, or entity which conducts economic activity, regardless of its legal and organizational form (§1–7 LPC).

62 COM(2018) 173 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0173:FIN (last visited: 30 July 2018).

which provide for somewhat more adversarial proceedings than those for antitrust violations.

To the extent that Article 37a LPC aims to protect legitimate interests of weaker parties to B2B transactions and, ultimately, the consumers, these two categories are also the typical complainants in unfair competition proceedings. Nevertheless, the CPC may initiate *ex officio* proceedings, including when it has already received a complaint from a private party.[63] Following the investigation stage, the case is heard on the merits by the members of the CPC. Unlike antitrust cases, there is a 2-month deadline to complete the proceedings, which can be extended by 30 days for complex cases. Another major difference is that the complaint may be withdrawn at any time, without stating any grounds, leading to the case being dismissed by the competition authority (Petrov, 2015).

In ASBP cases and unfair competition proceeding in general, the CPC may adopt one of the following final decisions (Article 98(1) LPC: i) infringement decision imposing a fine or a pecuniary sanction, ii) cease and desist order, iii) non-infringement decision, and iv) dismissal of the case. Interim measures are available only in cases against comparative or misleading advertising.

3. Fines and other sanctions

Infringements of Article 37a CPC could lead to pecuniary sanctions of up to 10% of the annual turnover in the products concerned by the violation (Article 100(2) LPC. However, unlike antitrust and merger control violations, there is a minimum of EUR 5,000 (approx.), and where there is no available turnover, the fine ranges between EUR 5,000 and EUR 25,000 (approx.). For example, in its only decision so far imposing pecuniary sanctions, the CPC set the fine at 7% of Kaufland Bulgaria's turnover in retail sales of low-end alcoholic beverages.[64]

V. Conclusions

Three years after the prohibition of ASBP became part of Bulgarian competition law in 2015, there is still a need to clarify its systematic place and ambivalent relationship with antitrust rules and unfair competition

[63] See e.g., CPC Decision No. 850 of 14 October 2016, *Lidl Bulgaria*.

[64] CPC Decision No. 1111 of 20 December 2016, *Keti-94 v. Kaufland Bulgaria.*

provisions. In particular, the concept of a 'superior bargaining position' in Article 37a(2) LPC – as opposed to the initially proposed 'significant market power' – seems to take no account of consumer welfare. It is true that consumer interests are considered at the stage of assessing abuse, just like under Article 21 LPC which prohibits abuse of dominance.[65] However, since the new prohibition of ASBP is meant to protect weaker contracting parties and especially SMEs, not competition as a process, mirroring antitrust analysis of unilateral conduct could be misleading. In fact, as it is already apparent from the decisional practice, establishing a superior bargaining position largely determines the outcome of cases under Article 37a LPC. On the other hand, since equality in bargaining positions is virtually non-existent, a criterion such as the ability to harm consumers could help differentiate 'normal' cases of superior bargaining position from those where such a position can be abused to the detriment of weaker contracting parties and consumers.

In any event, the prohibition of ASBP was only one of the measures in response to political demands for greater fairness in B2B relations in the food-supply chain. The concurrent amendments to the sector-specific LF followed more closely proposed solutions at the EU level, including the 2013 Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe[66] and the 2018 Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain.[67] During its rotating presidency of the Council, Bulgaria welcomed the proposed Directive and hosted a debate on how to ensure a common level of protection for small and medium agricultural producers across the EU.[68] However, the issue remains politically sensitive in Eastern Europe as Bulgaria joined Poland, Czech Republic, Slovakia, Hungary, Romania, Croatia, and Slovenia in a declaration urging for extended scope of the proposed Directive to cover multinational food retailers.[69]

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65 Comp. Article 21 LPC: 'may prevent, restrict, or distort competition and affect the interests of consumers', which defines abuse of a dominant position, with Article 37a(1) LPC: 'harms or may harm the interests of the weaker contracting party and the consumers', which defines ABSP.

66 *Op. cit.*, note 21.

67 *Op. cit.*, note 2.

68 'Bulgarian Presidency hosts a debate on how to ensure fair treatment for farmers by big retailers' (16 April 2018), https://eu2018bg.bg/en/news/876 (last visited: 30 July 2018).

69 'Visegrad +4 push for extension of unfair trade practices to large suppliers' (12 September 2018), https://www.euractiv.com/section/agriculture-food/news/visegrad-4-push-for-the-extension-of-unfair-trade-practices-to-large-suppliers/ (last visited: 30 July 2018).

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Vesna Patrlj**

CROATIA

I. Introduction

The Act on Prohibition of Unfair Trading Practices in the Food Supply Chain (hereinafter: ZNTP) entered into force on 7 December 2017.[1] Its full application begun as of 1 April 2018, since the Act allowed for existing contracts to be aligned with the new act by 31 March 2018, and any unaligned contracts became null and void on 1 April 2018.[2] The Act relies on a public body, the Croatian Competition Agency, to enforce its provisions. ZNTP lays out the rules and a system of measures for prevention of imposition of unfair trading practices in the food supply chain, the imposition of which enables the exercise of significant bargaining power of buyers and/or processors or re-sellers vis-à-vis their suppliers.[3] The aim of the Act is to establish, secure and protect fair trading practices that safeguard participants in the food supply chain.[4] ZNTP makes no difference between domestic and international suppliers.[5]

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1 *Zakon o zabrani nepoštenih trgovačkih praksi u lancu opskrbe hranom*, Official Gazette 117/2017.
2 Article 32 ZNTP.
3 Article 1 para 1 ZNTP.
4 Article 1 para 2 ZNTP.
5 Article 2f) ZNTP

In its reasons for adoption of the ZNTP[6] the Government took its inspiration from a number of EU documents.[7] Big structural changes in food supply chain due to increased concentration and vertical integration in the sector were cited as important factors for adopting new legislation.[8] The structure of the food supply chain in Croatia, similarly to EU, had on the one side very segmented and economically and competitively weak production structure (family farms and SMEs), while on the side of retailers, the market was concentrated, with especially high market power at the level of supermarkets as the dominant retail channel in Croatia. The recognized disparities, well recognized both at the EU level as well as in Croatia, led to the 'fear factor', i.e. the reluctance on the side of suppliers to start court proceedings due to possible loss of supplier status with dominant sellers at the retail level.[9]

According to the Government, the food supply chain in Croatia changed drastically within the last decade: big retail chains grew in strength, with a large number of small and medium retailers being forced out of business, with the market consolidating up to around ten retail chains.[10] With increased market concentration, accompanied by inefficient enforcement of existing rules, the spread of unfair trading practices had taken it to the point where practices considered as unfair according to EU practice and the newly proposed Act were considered usual commercial practice on the Croatian market.[11]

Numerous agricultural producers and food producing firms, as well as trade associations of agricultural producers and food industry (Croatian Chamber of Economy – Sector for Agriculture and Food Industry, Croatian Agricultural Chamber, Croatian Employers Union – Agricultural and Food

6 Final Draft of the Act on Prohibition of Unfair Trading Practices in the Food Supply Chain, http://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2022109 (last visited on 17.01.2019).

7 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Comittee and the Committee of the Regions tackling unfair trading practices in the business-to-business food supply chain COM(2014) 472 final; Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain COM/2016/032 final; European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI).

8 Final Draft of the Act on Prohibition of Unfair Trading Practices in the Food Supply Chain, http://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2022109 (last visited on 17.01.2019).

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

Industry Grouping) had been pointing out to this issue, asking relevant ministries to address the issue, which eventually led to the adoption of the ZNTP.[12] Most complaints related to practices mentioned in the European Commission and European Parliament documents, for example the difficult access to retail shops, imposing fees for entry into shops, placement fees in shops, late payments, MFN clauses, unilateral and retroactive amendments of contract terms, unilateral breach of contract, imposition of fee for private brands, imposition of standard agreements, retaliation conduct, unilateral removal of products from shelves, non-written contracts, imposition of environmental fees, imposition of additional discounts etc.

The Government saw the already existing rules of the Trade Act[13] (hereinafter: ZT), namely its Articles 63 and 64, as not precise and broad enough to be applicable to this new host of issues, since it applied only to the traders (*trgovci*), i.e. wholesalers and retailers in the food supply chain, and the new legislation was focusing on the relationship between producers (including primary producers), buyers, processors and wholesalers/retailers.[14]

Thus the need was recognized to prevent the downfall of the entire food production sector in Croatia, including family farms (*OPG*), and small, medium and large firms in agriculture and food industry, by adopting legislation aimed at preventing and sanctioning unfair trading practices in the food supply chain. Thus, on 17 November 2017 the ZNTP was adopted by the Croatian Parliament.

In order to help adresees understand and comply with the new rules, the Competition Agency – together with the Ministry of Agriculture – organised in February and March 2018 a series of workshops for businesses.[15] Most questions by participants related to sales and discounts, assortment rebates, product positioning on retailers' shelves, and the return of unsold products.

Also, prior to holding the workshops, in December 2017, the Competition Agency collected questions related to the application of the ZNTP through the Croatian Chamber of Economy (*HGK*), the Croatian Employers' Association (*HUP*), the Ministry of Agriculture, law firms and directly from the addresses of the ZNTP. The answers to these questions were consolidated in a single document made publicly available at the Agency

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12 *Ibid.*

13 *Zakon o trgovini*, Official Gazette 87/08, 96/08, 116/08, 114/11, 68/13, 30/14.

14 Final Draft of the Act on Prohibition of Unfair Trading Practices in the Food Supply Chain, http://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2022109 (last visited on 17.01.2019).

15 Almost a total of 700 people attended at six workshops organised in Zagreb, Split, Osijek, Rijeka, Pula, and Varaždin; Croatian Competition Agency, 2018, p. 86.

website. Subsequently, additional clarifications related to issues of sale, assortment and shelf, and to the notion of agricultural and food products and perishable agricultural and food products were published. Finally, the consolidated text of the Response to the ZNTP addressees was drafted, which was published on the Agency website.[16]

II. Detailed description of national legislation

Before the adoption of ZNTP, unfair trading practices (*nepošteno trgovanje*) were already regulated by the Act on Trade (ZT).[17] Its Article 63 prohibited unfair trading practices, which were defined as 'the conduct of the trader (*trgovac*) which harms good trading customs (*dobri trgovački običaji*) due to competition'. Article 64 ZT then listed, by way of example, certain unfair trading practices such as selling at loss, misleading advertising, etc. Sale at loss was not considered as an unfair trading practice provided some reasons existed which did not relate to restricting competition (such as when the expiry date was closing, in case of a complete sale due to shop closure, or its bankruptcy or liquidation).[18]

The main difference between ZT and ZNTP is that the former only regulates relationship between the traders (*trgovci)*, while the latter has a broader focus *rationae personae*, since it covers the relationship between producers, buyers, processors and re-sellers. However, as concerns *rationae materiae*, the ZNTP is more narrowly focused because it relates only to the food supply chain, while ZT covers trade in general.

As regards the issue of sale at loss and the demarcation in competence between the Competition Agency when enforcing the ZNTP, on the one hand, and the Ministry of Finance Inspection which enforces Act on Trade, on the other, it needs to be emphasised that the Agency – within the meaning of Article 12, para 14 ZNTP – only looks at cases where the sale is directed to end consumers. In such a case the Agency would determine what was the purchase price paid by the retailer and what was the retail price (price for end customer). Only in the exceptional case that the wholesaler

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16 Croatian Competition Agency and Ministry of Agriculture Guidebook of Q&As replying to queries of the addressed actors and explaining the UTPs rules (Consolidated text of 5 October 2018, including the previous versions of 5 February 2018, 28 February 2018, 7 March 2018, 30 March 2018 and 5 October 2018); http://www.aztn.hr/nepostene-trgovacke-prakse/cesta-pitanja/ (last visited on 17.01.2019).

17 *Zakon o trgovini*, Official Gazette 87/08, 96/08, 116/09, 114/11, 68/13, 30/14.

18 Article 64 para 2 ZT.

and the retailer were connected companies within the meaning of company rules and accounting rules, could the Agency look at the supply chain more broadly (Croatian Competition Agency, 2018, p. 84–85).

In all other cases the ZT and its rules on unfair trading practices (Article 64 ZT) are applicable, with Ministry of Finance Inspection being competent to oversee the compliance with the law (Article 66 ZT).[19]

There was an attempt to solve the B2B late payment issue, by adopting the Act on Financial Dealings and Pre-Bankruptcy Settlement (hereinafter: ZFPPN),[20] which deemed late payments as a form of unfair trading practices. ZFPPN contains a general rule on a 60-day payment period as regards fixed contracts.[21] If grossly unfair to the creditor, this contract clause may be declared null and void.[22] However, undertakings can agree on a longer period of payment (up to 360 days), provided that the debtor issued a security instrument with the legal effect of an enforceable title to the creditor.[23] The solution to link the possibility to set out a longer payment term with the debtor's duty to issue an enforceable title aimed to achieve a higher level of protection for creditors, and mitigate the negative effects of unjustifiably long contractual periods for payment (Government of the Republic of Croatia, 2012, p. 7). A payment period longer than 360 days would be null and void *ex lege*, without the need to assess whether the term is 'grossly unfair'.[24] Pursuant to the ZFPPN, the nullity of a contractual terms or practice is linked to the case-by-case assessment of its 'gross unfairness' only in two situations: (i) if the payment term fixed in the

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19 Under the provisions of Article 68 ZT, inspectors of the Ministry of Finance have a wide circle of authority so that they, inter alia, if they determine that the trader has done or carried out an action that is deemed unfair to trade, can prohibit a legal or natural person from continuing to perform trade activities for a period of at least 30 days until the elimination of established shortcomings; impose a measure of prohibiting the activity of trade with those products for which violations of the regulations have been established. In addition to the described measures, a fine of HRK 5,000.00 (approx. EUR 667.00) to HRK 300,000.00 (approx. EUR 40,000.00) for a legal person is also being held for the perpetrators, i.e. a fine of HRK 4,000.00 (approx. EUR 533.00) to HRK 70,000.00 (approx. EUR 9,333.00) for the responsible person in a legal person and a natural person.

20 *Zakon o financijskom poslovanju i predstečajnoj nagodbi*, Official Gazette 108/2012, 144/2012, 81/2013, 112/2013. More details on B2B late payments in EU Member States: Parziale, Lechardoy, Rzepecka and Fiorentini, 2018.

21 Article 11, paragraph 1 ZFPPN.

22 Article 14, paragraph 5 ZFPPN.

23 Article 11, paragraph 2 ZFPPN.

24 Article 14, paragraph 3 ZFPPN.

contract exceeds 60 days; and (ii) if the parties agreed on a period for verification of goods longer than 30 days.[25]

On the other hand, ZNTP contains specific rules on late payments in B2B transactions, but only relates to the food supply chain, unlike ZFPPN which has a general scope. The ZNTP expressly regulates that payment terms stipulated in contracts between operators in the food supply chain cannot be longer than 60 days from the date of receipt of the supplied agricultural or food product, or 30 days from the date of the receipt of the supplied fresh product.[26] It also treats payments executed within a period longer than 60 days, i.e. 30 days as an unfair trading practice.[27]

In its role as a public enforcer of the ZNTP, the Competition Agency has been prompted to declare that it had no competence in controlling quality or medical and hygienic correctness of agriculture and food products on the Croatian market. The Agency could determine if the concrete agreement between the supplier and reseller or between the supplier and buyer and/or processor, or any additional relevant documents, contain provisions on quality. Only exceptionally could the Agency examine the quality itself, for example if the reseller/buyer or processor unilaterally rescind the agreement with the supplier, due to bad quality of products delivered, and only if the supplier asked formally for proceedings to start because it held that the products satisfied the standard of quality as agreed. In this case would the Agency need to engage, with the help of the relevant court expert, with the question of quality (Croatian Competition Agency, 2018, p. 84).[28]

No enforcement decisions have as yet been adopted by the Competition Agency. First cases have been opened by the Agency in June 2018. Since the ZNTP came fully into force (1 April 2018) until October 2018, the total of 25 cases have been opened against some wholesalers/retailers and buyers.[29]

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25 Article 14 paragraph 5 ZFPPN.

26 Article 5 paragraph 1 point 3, and Article 6 paragraph 1 point 3 ZNTP.

27 Article 11 point 9, and Article 12 point 23 ZNTP.

28 See also General Administrative Procedure Act, Chapter III. Evidence (Official Gazette 47/09).

29 Proceedings have, for example, been opened against PLODINE d.d., KAUFLAND HRVATSKA k.d., NARODNI TRGOVAČKI LANAC d.o.o, LIDL HRVATSKA d.o.o. k.d., ULTRA GROS d.o.o., RIBOLA d.o.o., KOKA d.d., ŽITO d.o.o., PPK Valpovo d.o.o., FRAGARIA d.o.o., AGRO GOLD d.o.o., SETOVIA VOĆE d.o.o., MOSLAVINA VOĆE d.o.o., GLAVICE d.o.o., FERMOPROMET d.o.o., VINDIJA d.d. See www.aztn.hr/en_(last visited on 17.01.2019).

Since the Agency received only a small number of anonymous complaints, and holding that there was huge reluctance on the side of suppliers to formally ask for start of proceedings, the Agency *ex officio* asked for data from a sample of firms (31 biggest sellers and 20 buyers of fruit, vegetables and grain) at the end of May 2018. The aim was to find out if the ZNTP rules were obeyed or not. In this way, the Agency was able to get ample data and documentation (150 contracts and other documentation), which in effect allowed the Agency to start proceedings in the above mentioned 25 cases. The decisions are expected by the end of the first quarter of 2019.[30]

The early implementation of the ZNTP produced the unexpected effect of more discipline when it comes to payment deadlines between businesses, a most welcome effect which was left unachieved by previous legislation targeted specifically at this issue.[31]

III. Nature of infringement and scope of public enforcement

ZNTP applies to all participants in the food supply chain (producers, buyers, processors, wholesalers and retailers). The law prohibits the exercise of significant bargaining power of buyers and/or processors or wholesalers/ retailers (*trgovci*) with respect to their suppliers by imposition of unfair trading practices.[32]

Unfair trading practices within the meaning of ZNTP may be present between suppliers and buyers and/or processors and between suppliers and re-sellers.[33]

The notion of unfair trading practices is defined as 'contract terms and business practices imposed upon the supplier by the buyer and/or processor and/or re-seller, using their respective strong bargaining power in their relationship with the supplier, contrary to the principles of good faith and fair dealing, equality of contracting parties, principle of equal value of mutual services and good business practice in the production and/or trade of agricultural or food products; or, more precisely, contract terms and

30 There was a procedural delay since the governing body of the Agency, the Competition Council, was unable to adopt decisions in the period between mid November 2018 until late January 2019 due to its incomplete composition.

31 http://www.aztn.hr/en/first-effects-of-the-utps-act-payment-deadlines-observed/ (last visited on 17.01.2019).

32 Article 3 para 1 ZNTP.

33 Article 4 para 1 ZNTP.

business practices that are not in line with the provisions of Articles 4 to 12 of this Act'.[34] The list is not illustrative, but exhaustive, and the Agency is authorised to act only in case of one of the above mentioned situations.

1. Strong bargaining power and unfair trading practices

As already mentioned, the ZNTP prohibits exercise of significant bargaining power of the buyer and/or processor or re-seller with respect to their suppliers by imposition of unfair trading practices.[35] It is deemed that a re-seller whose total annual turnover and total annual turnover of companies connected to the re-seller realized in the Republic of Croatia exceeds the amount of HRK 100 million (approx. EUR 13.3 milion) has significant bargaining power.[36] Moreover, it is deemed that a buyer whose total annual turnover and total annual turnover of companies connected to the buyer realized in the Republic of Croatia exceeds the amount of HRK 50 million (approx. EUR 6.6 milion) has significant bargaining power.[37] Finally, it is deemed that a processor whose total annual turnover and total annual turnover of companies affiliated to the processor realized in the Republic of Croatia exceeds the amount of HRK 50 million (approx. EUR 6.6 milion) has significant bargaining power.[38] The turnover mentioned above excludes the turnover realized through the sale of goods or provision of services between connected companies (companies within a group).[39]

2. List of unfair trading practices

The following constitutes unfair trading practices in the production, processing and/or trade in agricultural or food products that are imposed on suppliers through the use of strong bargaining power:

'1. A written agreement between the buyer and/or processor or re-seller and their suppliers that has not been drawn up in accordance with the provisions of this Act or any obligations imposed on the supplier that have not been foreseen in the written agreement concluded between the buyer and/or processor or re-seller and their suppliers,

34 Article 2 b ZNTP.
35 Article 3 para 1 ZNTP.
36 Article 3 para 2 ZNTP.
37 Article 3 para 3 ZNTP.
38 Article 3 para 4 ZNTP.
39 Article 3 para 5 ZNTP.

2. Payments that are not clearly indicated or specified on the invoice or goods receipt note,
3. General operating terms and conditions of the buyer and/or processor or re-seller that are not in compliance with the provisions of this Act,
4. Possibility of unilateral termination of the agreement concluded with the supplier, on the part of the buyer and/or processor or re-seller, without written notice or without specifying any justifiable reasons for such contract termination, or the possibility of cancelling the agreement concluded with the supplier without an adequate cancellation period, or the possibility of the agreement being unilaterally amended by the buyer and/or processor or re-seller,
5. Disproportionately high liquidated damages with respect to the value and importance of the object of the actual obligation, and
6. Other unfair trading practices prescribed by this Act'.[40]

3. Other unfair trading practices – buyers and/or processors

Apart from the unfair trading practices referred to in Articles 4 and 5 and in Articles 7 to 10 of ZNTP, other unfair trading practices in the relationship between the supplier and buyer and/or processor in the trade in agricultural or food products are the following:

'1. Non-transparent reduction of quantity and/or value of agricultural or food products of standard quality,
2. Delivery of a blank promissory note for the handed-over production material, without the buyer and/or processor having the obligation to issue any security instrument for the handed-over but unpaid agricultural or food products,
3. Making the conclusion of an agreement and business cooperation conditional upon barter arrangements,
4. Failure to take over agreed quantities of agricultural or food products in accordance with the agreed purchasing schedule, except in justified situations as established by virtue of the relevant agreement,
5. Charging a fee for concluding an agreement with the supplier that is disproportionate to the administrative costs that the supplier should normally bear,
6. Refusal to receive a delivery of agricultural or food products upon falling due of the supplier's delivery obligation, unless this is caused by

[40] Article 4 para 2 ZNTP.

reasons stipulated in the agreement as justified reasons for refusing to receive a delivery,
7. Charging a fee to the supplier for ullage, spillage, spoilage and theft of products after delivery of the agricultural or food products, or transfer of operational risk to the supplier,
8. Imposing an obligation not to sell agricultural or food products to other buyers and/or processors at prices that are lower than the ones paid by the buyer and/or processor, and
9. Payment to the supplier within a period exceeding 60 days from the date of receipt of the supplied agricultural or food product or exceeding 30 days from the date of receipt of the supplied fresh product.'[41]

4. Other unfair trading practices – re-sellers

Apart from the unfair trading practices referred to in Article 4 and in Articles 6 to 10 of the Act, other unfair trading practices in the relationship between the supplier and re-seller in the trade of agricultural or food products are:
'1. Charging listing fees for the supplier's agricultural or food product,
2. Charging slotting fees in order to have the product placed on the shelves in the re-seller's retail outlets, unless the supplier expressly requests from the re-seller to have its product placed on a specific shelf in the re-seller's outlets,
3. Returning of delivered but unsold products, charging fees for disposal of such products, charging fees to the supplier for products that have remained unsold past their expiration date, unless products are delivered to the re-seller for the first time and unless the supplier has expressly requested that the products be sold even after having been notified by the re-seller, in advance and in writing, that the expiration date of these products may pass due to low turnover,
4. Charging a fee for concluding an agreement with the supplier that is disproportionate to the administrative costs that the supplier should normally bear,
5. Charging a fee for delivery of an agricultural or food product outside the agreed place of delivery,
6. Charging a fee for storage and handling after the agricultural or food product has been delivered to the re-seller,

[41] Article 11 ZNTP.

7. Charging a fee for extension of the re-seller's store network, improvement (refurbishing) of the re-seller's existing outlets, extension of the re-seller's warehouse capacities, extension of the re-seller's distribution network,
8. Refusal to receive a delivery of agricultural or food products upon falling due of the supplier's delivery obligation, unless this is caused by reasons stipulated in the agreement as justified reasons for refusing to receive a delivery,
9. Making the conclusion of an agreement and business cooperation conditional upon barter arrangements,
10. Making conclusion or renewal of an agreement and receipt of delivered agricultural or food products, which are the subject matter of such agreement, dependent upon accepting the request to produce and deliver agricultural or food products comparable to the agreed or delivered products (re-seller's own brand),
11. Charging a fee for services that have not been provided or for services that have been provided even though they have not been agreed upon by the parties,
12. Charging a fee for re-seller's reduced turnover, sales or margin caused by falling sales of a specific agricultural or food product,
13. Transfer of operating risk from the re-seller to the supplier, by charging a fee for ullage, spillage, spoilage and theft of products and charging a fee for any fines or other penalties imposed on the re-seller by virtue of a decision issued by a competent authority, unless such penalties imposed by virtue of decisions of competent authorities are a consequence of a defect in the product attributable to the supplier within the meaning of general regulations governing civil obligations,
14. Sale of an agricultural or food product to the end consumer at a price that is lower than any purchase price in the chain of supply of this particular product including value added tax, unless these products are nearing their expiration date or this particular agricultural or food product is being recalled from the re-seller's product range or unless there is a closeout sale due to closing of a particular store. Where the supplier is at the same time a wholesaler and a company affiliated to a retailer, the establishing of the purchase price of a product within the meaning of this Act may involve the examination of contractual relations between the wholesaler and a supplier and/or producer that is not considered to be its connected company within the meaning of this Act,
15. Sale of an agricultural or food product below the price of production in case of the re-seller's own production (re-seller's own brand), unless

where these products are nearing their expiration date or this particular agricultural or food product is being recalled from the re-seller's product range or unless there is closeout sale due to closing of a particular store,

16. Stipulating a fee in the agreement that is not indicated on the invoice, other than the fee that is conditional upon the actual and measurable performance of the re-seller in connection with the service that the re-seller provides to the supplier,
17. Charging a fee for the re-seller's marketing and advertising services, unless the supplier has expressly requested from the re-seller special advertising of its products that are available in the re-seller's outlet,
18. Stipulating a fee in the agreement for conducting market research,
19. Charging a fee for sales data for the supplier's products at the re-seller's outlets, unless the supplier has expressly requested this type of data from the re-seller,
20. Making the conclusion of an agreement or business cooperation dependent upon imposition of the obligation to participate in discounts or special offers through reduction of the purchase price at the detriment of the supplier,
21. Obligation not to sell agricultural or food products to other re-sellers at prices lower than the ones paid by the re-seller,
22. Removal of certain products from the list of agreed products that the supplier supplies to the re-seller or significant reduction in orders of a particular agricultural or food product, without the re-seller's prior sending of a written notice to that effect within the time limit stipulated in the agreement or, where no time limit been established by virtue of the agreement, within a time limit of at least 30 days,
23. Payment to the supplier within a period exceeding 60 days from the date of receipt of the supplied agricultural or food product or exceeding 30 days from the date of receipt of the supplied fresh product, and
24. Failure to take over the agreed and produced quantities of agricultural or food products produced under the re-seller's brands, except in justified circumstances as established in the agreement'.[42]

[42] Article 12 ZNTP.

5. Rules relating to the form of a contract and mandatory content

The ZNTP also strictly imposes form- and content-related rules as regards contracts between suppliers and buyers and/or processors, as well as contracts between suppliers and wholesalers/retailers (*trgovci*). Thus, an agreement between the supplier and buyer and/or processor must be concluded in written form and must contain all provisions that are material to the business relationship between the contracting parties, in particular relating to the price of the product and/or the manner of establishing or calculating the price, the quality and type of the agricultural or food product that is supplied to the buyer and/or processor, the terms and conditions as well as time limits for payment for the supplied agricultural or food product (the time limit for payment shall not exceed the period of 60 days from the date of receipt of the supplied agricultural or food product, or it shall not exceed 30 days from the date of receipt of the supplied fresh product), the terms and conditions as well as time limits for delivery of agricultural or food products that are the subject matter of the agreement, the place of delivery of the agricultural or food product, and duration of the agreement.[43]

If the contract was not concluded in written form and does not contain all the above mentioned provisions, it is considered as null and void.[44]

By way of exception, a written agreement is not required if the primary producer accepts the order from the buyer and/or processor on the basis of publicly accessible terms and conditions of the buyer and/or processor if they contain all of the above mentioned provisions (except for the one relating to duration of the contract) in which case they shall be binding on the parties and attached to the goods receipt note; or, if the primary producer and buyer and/or processor have concluded a joint production agreement that also contains all the above mentioned provisions.[45]

In addition, another exception from mandatory written form is provided for a situation where the primary producer supplies an agricultural or food product to the buyer and/or processor which is a co-operative that includes the primary producer as one of its members: in such a situation no written agreement is required if the Articles of association of the co-operative or any written rules and decisions that are defined within the Articles of association or that derive therefrom, contain mandatory elements mentioned above.[46]

43 Article 5 para 1 ZNTP.
44 Article 5 para 2 ZNTP.
45 Article 5 para 3 ZNTP.
46 Article 5 para 4 ZNTP.

While contracts concluded between suppliers and resellers also have to be in a mandatory written form and must contain mandatory contractual elements (content), the exceptions mentioned above for contracts between suppliers and buyers and/or processors are not applicable.[47]

6. Nullity

Any provision of the agreement concluded between the supplier and buyer and/or processor or between supplier and re-seller, allowing the buyer and/or processor or re-seller to unilaterally terminate the agreement without written notice or without specifying any justifiable reasons for termination of the agreement, are deemed null and void.[48]

Any provision of the agreement concluded between the supplier and buyer and/or processor or between supplier and re-seller, allowing the buyer and/or processor or re-seller to cancel the agreement without adequate cancellation period, are deemed null and void.[49]

Any provision of the agreement concluded between the supplier and buyer and/or processor or between supplier and re-seller, allowing the buyer and/or processor or re-seller to unilaterally amend the agreement, are deemed null and void.[50]

IV. Public enforcement institution and proceedings

1. Institution

The Competition Agency is in charge of enforcing the ZNTP.[51] It is the Competition Council, a collegiate decision-making body of the Agency, which is authorised to adopt decisions on the basis of ZNTP by a majority vote of at least three votes, with no member of the Council being allowed to abstain from voting.[52]

The Agency must report annually to the Croatian Parliament on its enforcement activities in relation to ZNTP.[53]

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47 Article 6 ZNTP.
48 Article 9 para 1 ZNTP
49 Article 9 para 2 ZNTP
50 Article 9 para 3 ZNTP
51 Article 13 para 1 ZNTP.
52 Article 13 para 2 ZNTP.
53 Article 16 ZNTP.

2. Proceedings

The Agency acts *ex officio* or at the request of a party. This is an administrative (investigation) procedure, whereby the Agency determines all relevant facts and circumstances related to determining the prescribed amount of the total annual income of traders, purchasers and processors, as well as the exercise of significant bargaining power by imposing unfair trading practices, and the procedure for establishing the existence the conditions for pronouncing fines in individual cases. In this regard, the Agency acts on the basis of the Law on General Administrative Procedure and the ZNTP.

3. Commitments

The party against whom the administrative procedure has been initiated may propose to the Agency, within 40 days from the date of initiation of the procedure, to assume an obligation to execute certain measures and conditions and the deadlines in which it will do so in order to eliminate unfair trading practices.[54]

Depending on the severity of the injury, the extent of the violation and the duration of the violation determined in the investigation procedure, the Agency will assess whether the proposed measures, conditions and deadlines are sufficient to eliminate unfair trading practices and, in the event of a positive assessment, accept the proposed measures, conditions and deadlines that become mandatory for the applicant.[55]

By submitting evidence on the fulfillment of the undertaken measures and obligations (commitments), the Agency shall suspend the procedure without establishing that the Law has been violated and without imposing fines.[56]

If the parties against whom the procedure is initiated do not offer the Agency a measure, or the Agency assesses that the proposed measures are insufficient to eliminate unfair trading practices, or if the party fails to submit evidence of the implementation of the measures, the Agency will continue to conduct the administrative procedure.[57]

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54 Articl 18 para 1 ZNTP.
55 Article 18 para 2 ZNTP.
56 Article 18 para 4 ZNTP.
57 Article 18 para 5 ZNTP.

4. Procedure[58]

The procedure set up under ZNTP is administrative (investigation) procedure, requiring a thorough, multidisciplinary, case-specific approach. It is a strict formal procedure, which cannot be shortened. The decision of the Agency can be appealed with the court (under an administrative dispute court procedure). All procedural rights have to be guaranteed to the parties and all relevant facts and evidence have to be examined in order to safeguard all parties' rights as guaranteed by the Constitution and relevant laws. The proceedings at the level of the Agency are led by the Agency staff, that is qualified lawyers with four years of experience in law after the passed bar exam, and in respect of economic issues, Agency economists are engaged and take part in the case.

The procedure is divided in five parts:

1) collection of written evidence,
2) oral hearing,
3) the Council's decision on the established facts in the proceedings,
4) statement of facts and main hearing,
5) fines.

4.1. Collection of written evidence

The Agency is authorized to send written requests to parties in the proceedings, or to other legal or natural persons that are not parties, as well as co-operatives, expert or economic interest groups or associations and chambers, requesting whatever information is required to be delivered in the form of written statements, or requesting that agreements and other necessary data and documentation be delivered for review.[59]

The gathered material is analysed from the legal and economic standpoint and thus all relevant case-specific facts are being determined related to the amount of total annual income of sellers, buyers and processors, as well as facts related to the exercise of significant bargaining power through unfair trading practices, and to determine if conditions exist that would allow imposing fines.

It is generally a written procedure, although if needed an on-site investigation may also be conducted.

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58 Adapted from: Croatian Competition Agency, 2018, p. 79–82.

59 Article 17 ZNTP.

4.2. Oral hearing

The oral hearing takes place in order to determine relevant facts but also to allow parties to exercise their rights and interests. The hearing encompasses hearing of parties and witnesses (most frequently the supplier claiming it has been a victim of an unfair trading practice), as well as experts, if specific expert knowledge and experience is needed to shed light on a specific aspect of a business relationship, meaning it could be an agricultural expert, quality control expert, chemical engineering and technology expert.

At this stage, the party against whom the procedure is being conducted has the right to participate in the hearing of witnesses and expert witnesses in written and oral manner about all the facts presented in the examination procedure, on the proposals for the presentation of evidence and the evidence submitted, asking questions as well as getting to know them with the results of the evidence and the statement on the results of the evidence.

4.3. The Council's decision on the established facts in the proceedings

After determining all relevant facts and circumstances in the investigation procedure, the expert service is informed by the Competition Council, which, based on the established factual situation, decides on whether the party violated the provisions of the ZNTP.

4.4. Statement of facts and main hearing

If the Council decides that the party has violated the ZNTP by imposing unfair trading practices on its supplier, the procedure for determining the existence of the conditions for pronouncing the fine shall commence.

In this procedure, the Agency shall deliver the following to the party:

- notification of the established factual situation in the specific case and
- notification of the content of the decision of the Council made on the basis of the established factual situation and
- invitation to the main hearing and delivery of written defense.

At the main hearing of the proceedings, the presentation of defense and protection of interests must be allowed. That includes evidence determining the existence of conditions for pronouncing the administrative-punitive measures as well as mitigating and aggravating circumstances as criteria for setting the fine.

4.5. Fines

Upon the conclusion of the main hearing, the Council decides on the existence of the conditions for pronouncing the fine, determines its level, and determines the deadlines and manner of its execution.

Based on two decisions of the Council (the exercise of significant negotiating power by imposing unfair trading practices or the violation of ZNTP, and the fine and its amount), the Agency issues a single decision determining the violation of ZNTP and pronounces a fine.

The decision terminating the procedure is published on the Agency's website, with confidential business information left out.

5. Duration of the administrative proceeding (investigation) and Agency decisions

The duration of a particular administrative proceeding depends on the one hand on the complexity and scope of the information and documentation (such as agreements, supplementary financial documentation, necessary analyses of the specific rules regulating the area concerned etc.), but also on the behaviour of the party to the proceeding (its readiness to cooperate and propose remedies on its own initiative). Where the party agrees to undertake commitments on its own initiative, the proceeding is shorter and can be closed within a 3 to 6 month period from the day on which the proceeding was initiated.

However, where the party does not propose remedies within the statutory period of 40 days, or where the Agency finds that the proposed remedies do not suffice for the fast and effective return to fair trading practices, it will continue the proceedings, which can take from 9 to 12 months on average.

6. Fines

After establishing that the party has used significant negotiating power by imposing unfair trading practices on its supplier or violating the provisions of the ZNTP, the Agency will decide on the existence of the conditions for pronouncing the fine and determine its amount, as well as the deadlines and the manner of its execution. In determining and pronouncing the fine, the Agency shall take into account the severity of the injury, the extent of the injury, the duration of the injury and the consequences.[60]

[60] Article 27 ZNTP.

The determined amount of fine is reduced or increased depending on the mitigating and/or aggravating circumstances identified. Fines aim at establishing, securing and protecting fair commercial practices that protect participants in the food supply chain, punishing the perpetrator of the violation and deterring perpetrators and other persons from violating the Law. ZNTP defines which are difficult, and which easier violations of the Law and, accordingly, defines the maximum amounts of fines.

The very serious violation of ZNTP is the sale of products to the final consumer at a price lower than any purchase price in the supply chain of that product (Article 12 point 14), for which the fine is up to a maximum of HRK 5,000,000 (approx. EUR 666,000) for a legal person, or HRK 2,500,000 (approx. EUR 333,333) for a natural person.[61]

Serious infringements of ZNTP are unfair trading practices that are imposed on suppliers by purchasers and/or processors or traders by exploiting their significant bargaining power, and are prescribed by the provisions of Articles 4 to 12 of ZNTP, including the failure of the purchaser and/or processor, or traders to act upon the decision of the Agency, in the part relating to the obligation to execute certain measures, conditions and deadlines for the elimination of unfair trading practices (Article 20, paragraph 1, subparagraph 1), as well as failure to align previously concluded contracts with the provisions of the ZNTP (Article 32). For these violations, the fine is foreseen up to a maximum of HRK 3,500,000 (approx. EUR 466,667) for a legal entity, or HRK 1,500,000 (approx. EUR 200,000) for a natural person.[62]

Lighter infringments of ZNTP are the failures of the party in the proceedings to submit the requested information in the form of written statements, necessary data, contracts or documents at the request of the Agency,[63] as well as acting upon the proposed undertaken obligations for the execution of certain measures and conditions within the deadlines set by the provisional decision of the Agency as obligatory for the party in the procedure.[64] For these violations, a fine up to a maximum of HRK 1,000,000 (approx. EUR 133,333) can be imposed for a legal entity and HRK 500,000 (approx. EUR 66,667) for a natural person.[65]

The ZNTP also envisages fines in the amount up to a maximum of HRK 100,000 (approx. EUR 13,000) for a legal entity or HRK 25,000 (approx.

61 Article 24 paragraph 1 ZNTP.
62 Article 24 paragraph 2 ZNTP.
63 Article 17, paragraph 3 ZNTP.
64 Article 18 paragraph 1, 2 and 3 and Article 20, paragraph 2 ZNTP.
65 Article 25 ZNTP.

EUR 3,333) for a natural person who does not have the status of a party if they fail to submit written information, data, contracts or documentation upon request of the Agency.[66]

7. Judicial control

An appeal is not allowed against the Agency's decision, but an administrative dispute may be initiated.[67] The lawsuit against the Agency's decision does not have a suspensive effect, except in relation to the part of the decision concerning the fine.[68] Also, claims against the Agency's decision to resolve procedural issues do not stop the course of the proceedings, and all disputes brought before the competent administrative courts under the provisions of the Law are urgent.[69]

V. Conclusions

The early implementation of the ZNTP produced the effect of more discipline when it comes to payment deadlines between businesses. Payments were effected within deadlines prescribed by the ZNTP. Furthermore, since the written contractual form is required by law, there was more transparency and therefrom more legal certainty for suppliers.

In general, it can be observed that traders, wholesalers and retailers, succeeded in achieving a higher degree of compliance with the ZNTP when compared to buyers and processors, who obviously started late with their compliance efforts, changing their attitude towards the new rules only after the Competition Agency started proceedings against several of them.

Despite initial positive effects, it seems certain that the normative framework, after being tested in practice, will need some adjustment in near future. First, the ZNTP provides for a closed list of commercial practices which are prohibited as unfair, and it seems that a more general clause will be more appropriate, taking into account that the Agency is unable to act in situations where parties find their way around the rigid wording of the law to engage in unfair practices that are not prescribed as prohibited.[70]

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66 Article 26 ZNTP.

67 Article 20 paragraph 3 ZNTP.

68 Article 20 paragraph 4 ZNTP.

69 Article 20 paragraph 5 and 6 ZNTP.

70 It should be noted though that experiences of other countries with the general clause are not without controversy. For example, Poland has a general clause in its legislation

A general clause would allow the Agency to assess if in a concrete case the undertaking exercised its significant bargaining power thereby breaching the principle of equality of the parties and the principle of equal prestations.

Second, it would also seem necessary to change the definition of significant bargaining power in the ZNTP, more in alignment with the Draft Directive, since current definition seems to allow a situation where the law would be applied vis-à-vis a trader that has a lower level of bargaining power in comparison to its supplier.

As regards the proposed EU draft Directive on UTPs, Croatia's position was that the Draft Directive was not strict enough and that more forms of unfair practices should be included in the Directive on the basis of the 2016 EU Parliament and Council Resolution. This position was in line with the logic of the ZNTP which has broader scope and even obliges all the dealings between the parties to be in written form.

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but it was criticized for its 'inherent vagueness' and its 'unpredictability'. See Piszcz, A. (2018). The EU 2018 Draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products. Retrieved from: http://www.yars.wz.uw.edu.pl/yars2018_11_17/143.pdf (last visited on 17.01.2019), at 159.

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CZECH REPUBLIC

I. Introduction

1. Food supply chain in Czech Republic

The food chain covers all subjects and activities from primary agricultural production to food processing, distribution, retail and consumption. According to the last Annual Report[1] of the Czech Office for Protection of Competition (UOHS), the activities within the food chain have been for years suspected of being not fair because the material value in the food chain is not evenly spread across all its levels. This is due to the different scope of bargaining power between smaller and more vulnerable subjects and their more powerful and concentrated business counterparts. Since 2010, the UOHS has investigated unfair trade practices in the food chain.

Nevertheless, concentration in the Czech food supply chain sector is by no means excessive. Three years ago, none of the three largest retail chains reached a bigger share than 12% on the relevant market in retail sales

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[1] Annual Report 2017, accessible at http://www.uohs.cz/en/information-centre/annual-reports.html, p. 26 ff.

of food, while the collective share of the eight largest chains approached 63%.[2] The Czech market with its low level of concentration is rather unique EU-wide, despite ongoing rising concentration towards west European levels.

The market share of top five chains increased from 46% in 2013 to 48,5% in 2014 and the trend goes on. First 10 food supply chains represent the main shopping place for 96% of Czech households and the first five chains are the main shopping place for 71% of the population.[3]

In terms of absolute figures (turnover volumes), Kaufland has occupied the first spot for several years (turnover over CZK 50 billion in 2015, CZK 57 billion in 2016, approximately EUR 2.2 billion[4]), followed by Tesco Stores ČR (more than CZK 44 billion, EUR 1.7 billion), Ahold (Albert since 2019) ČR (CZK 40 billion, EUR 1.55 bilion), Penny Market (more than CZK 30 billion, EUR 1.16 billion) and Makro cash & carry (approx. CZK 30 billion, EUR 1.16 billion).[5] In 2016, big food retail chains further consolidated their market position, increasing sales by 22 billion CZK to 327 billion CZK (EUR 12.7 billion). Kaufland has kept its leading position, followed by Ahold (supermarkets and hypermarkets branded Albert) which increased its footprint thanks to the acquisition of Interspar and Spar. Tesco was third and Lidl was fourth (two places higher than in the previous year). Penny Market and Makro have shifted one position lower even though their revenue grew by hundreds of million CZK (Špačková, 2016).

Very good results of Czech food chains mirror the positive development of the Czech economy and the rising power of Czech consumers. The chains are earning billions of CZK before taxation.[6] The biggest chains with broad range of products are challenged by a quickly growing biggest domestic e-retailer, Alza.cz (ČTK, 2017).

It is clear that neither of these enterprises has the market power to endanger competition, where the case-law-principle of *special responsibility of the dominant undertaking* would apply. The market with this structure is rather competitive, although there is a group of leading, relatively strong entities which are, in addition, still growing.[7]

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2 Explanatory memorandum on the draft amendment to the SMPA, pp. 11–13.

3 Traditionally mighty Kaufland was the main food shopping point for 23% of the respondents in 2014 (increase by 3%, compared with 2013). Penny Market was placed second (14%, interannual stagnation), Tesco was third (13%), Albert fourth (12%, interannual decrease by 2%) and Lidl fifth (9% of preferences and 1% decrease). See Přibík, 2015.

4 All CZK/EUR recounts relate to exchange rate valid in February 2019.

5 *Ibid.*

6 So Lidl for example raised its gross profit before taxation between 2015–2016 by 55%.

7 According to information provided by employees of UOHS at the St. Martin Conference on 12 November 2014, there are about 18,000 businesses on the Czech food market

2. Map of relevant Czech laws

2.1. Private law

Up to now, unfair trading practices are dealt with only in cases where B2C relations are concerned. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market was implemented into Czech legal order through the Consumer Protection Act[8] and came in force on 12 February 2008 already. It does not apply to B2B relations, similarly as the Directive 2005/29.

Nevertheless, as a matter of principle, general civil law regulation of unfair competition involves among others unfair trading practices. According to Section 2976 of the Civil Code (Basic provisions of unfair competition), if (in business relations) a person gets into conflict with 'good morals' of competition as a result of his conduct capable of causing harm to competitors or customers, such a person has competed unfairly. It might roughly be labelled as good commercial practice. Unfair competition is prohibited. Unfair competition shall include (without limitation) misleading advertising; misleading identification of goods and services; creating a likelihood of confusion; free-riding on the reputation of an enterprise, product or services of another competitor; bribery; disparaging a competitor; comparative advertising, unless allowed as admissible; breach of business secrets; unsolicited advertising, and threat to health and the environment. Only misleading and comparative advertising are harmonized. Czech national law does not use the term 'unfair trading practices' in B2B relations but, instead, 'unfair competition'.

This private law regulation applies regardless both of the industry and the bargaining power of the parties involved.

General private law protection against unfair trade practices may use another tool since 2014, namely the so-called 'protection of a weaker party'. Sec. 433 of the Czech Civil Code prescribes that a person who acts as an entrepreneur with respect to other persons in economic transactions may not abuse his expertise or economic position to create or take advantage of the dependence of the weaker party and to achieve a clear and unjustified imbalance in the mutual rights and obligations of the parties. It means that both B2C and B2B constellations are affected. The Act presumes that the person who, in economic transactions, acts with respect to the entrepreneur

and the 50th competitor by size has a mere 0.1% share of the relevant market.

8 Act 634/1992 Sb., zákon o ochraně spotřebitele (Consumer Protection Act), as ammended.

in a manner unrelated to his own business activities is always the weaker party. The weakness of an entrepreneur vis-à-vis another entrepreneur cannot be presumed but, instead, it has to be evidenced in order to make use of this kind of protection. By all means, it is a general declaration without any list of demonstrative examples. There is no Czech case law concerning this general provision available up to now.

The same may be said in relation to the general protection against the abuse of good commercial practices. Section 580 of the Civil Code declares a legal act invalid if it is contrary to good morals or contrary to a statute, if so transpires from the sense and purpose of this statute. This well-meant 'safety valve' does not exclude B2B relations that bear the characteristics of unfair trading practices. So unfair trade practices between entrepreneurs may be confused or interchanged with unfair competition (Ondrejová, 2016, p. 31). The envisaged EU Directive on unfair trading practices can hardly change this settled, if unprecise, use of the same term with several possible meanings. It is caused by the collocation of three general words whose use cannot be monopolised by anyone.

2.2. Public law

This 'common label' *unfair trading practices* mentioned above has to be internally discerned from the meaning given to the same appellation by specific public law regulation related exclusively to the abuse of significant buying power in markets with agricultural and food products[9] (see below).

2.2.1. Competition Act

Another public law regulation (on protection of competition[10]) prohibits, among others, the abuse of a dominant position in the relevant market. This might admittedly be a relevant market with different agricultural or food products and the abuse may consist of unfair trading practices in a broad sense (disproportionate business terms and conditions), but having a dominant position by the infringer is a prerequisite for applying this protection. It is not the case in the Czech Republic because no distributor in the relevant market is going to approach such a level of market power.

[9] Act No. 395/2009 Sb., on Significant Market Power in the Sale of Agricultural and Food Products and its Misuse, as amended (hereinafter referred to as the 'Act on Significant Market Power' or 'SMPA').

[10] Act No 143/2001 Sb., on Protection of Economic Competition, as ammended (referred to as the 'Competition Act').

2.2.2. Price Act

The Czech legal order contains one regulatory 'heritage' from the time of privatisation and of the fear of uncontrollable price increases connected therewith, namely prohibition of the abuse of the so-called more advantageous economic position under the Act No 526/1990 Sb., on Prices ('price act'), as amended. It is partially relevant and interconnected with the topic of unfair trading practices. According to this act, the buyer must not abuse its more advantageous economic position in order to gain inadequate pecuniary advantage by employing its more advantageous economic position to purchase products for a price that does not cover reasonable costs to a substantial extent or for a price below the usual price. It is obviously connected with one example of the most frequent abuse of bargaining position of distributive chains as the stronger parties with regard to their suppliers, namely urging the suppliers to sell below costs. This provision has been used only several times within almost 30 years and never against any distributive chain. Moreover the price act as such is subject to hard criticism and it is not supposed to be used frequently.

2.2.3. SMPA

The most focused public law concerning unfair trade practices in the B2B context is the act on significant market power (SMPA).[11] This law intends to assess and prevent abuse of significant market power in relation to the purchasing of food for the purposes of resale in the Czech Republic or services associated with such purchases or the sale of food. As to the abuse of significant market power conducted abroad, it is assessed under this Act if its effects occurred or may occur in the territory of the Czech Republic.

Significant market power is a concept whose aim should have been to catch abusive behaviour by buyers whose market shares (as described above) do not allow applying the rules on dominant position. Significant market power is defined in Section 3 (1) of the SMPA as a position of the buyer enabling the buyer to extract an advantage from his suppliers within the market in specific commodities (food). Such a position has arisen as a result of the market situation – i.e. spontaneously. Of course, 'significant' market power can also generally arise in the opposite direction, i.e. in terms of a supplier being able to extract advantages from his buyer. However, this case

[11] Act 395/2009 Sb. of 9 September 2009, on Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof, as ammended by the act 50/2016 Sb. Accessible at: http://www.uohs.cz/en/legislation.html.

is not covered by the definition of the statutory definition. Consequently, under the applicable SMPA, a significant market power may only arise on the part of the buyer, if the latter is able to enforce unilaterally favourable business terms as a result of existing market conditions.[12]

Consequently, the application of the SMPA shall also ensure that an entity with actual market power (dominance) on the supply part of the transaction cannot be forced to accept unfavourable terms offered by someone who lacks real market power, but has 'significant market power'.[13]

Where a buyer becomes dependent on a certain supplier as a result of unlawful steps taken by the supplier (abuse of dominant position, prohibited agreement restricting competition), the resulting situation can be dealt with under the Competition Act.

II. Description of the Czech national legislation on significant market power

Privately enforced law against the abuse of contractual/bargaining power in the food supply chain, law on unfair competition (including unfair trading practices) and particular provisions of the Czech Civil Code have already been mentioned above. They are generally considered not to be efficient and the use of them against unfair trading practices is mostly hypothetical. Therefore, only publicly enforced law against abuse of significant market power is dealt with henceforth, and within it, the unfair trading practices.

1. Public law regulation in the SMPA

The SMPA, as the corner stone of the public enforcement of abuse of bargaining power in the food sector, attempts to define the significant market power in Sec. 3 of the SMPA (see chapter III.2) and the prohibited practices of entities with significant market power in Secs. 3a and 4 of the SMPA (see chapter III.4). The current character of the SMPA derives from

[12] The notion of business terms and conditions is evidently used more broadly than 'indirect contractual arrangement'; thus, it is an 'unilaterally' favourable relation between the rights and obligations of the parties for the buyer's benefit without necessarily stipulating them in the institutionalised business terms and conditions in the sense of Section 1751 of Act No. 89/2012 Coll. (the Czech Civil Code).

[13] However, this is inherently contradictory and denies not only the function of market self-regulation, but also the sense and function of the ASMP, in whatever way we understand it.

a major amendment of the SMPA adopted in February 2016 (Amendment 2016,[14] in force since March 2016). Its goal was to simplify the application of the law and to clarify certain key terms, like significant market power or buyer (see below).

The failing to abide by Sec. 3a or Sec. 4 leads to liability of the infringer for an administrative offence.[15] This may be sanctioned with a fine of up to CZK 10 million or 10% of the net turnover achieved by the buyer in the last closed accounting period. The liability for an administrative offence shall pass onto the infringer's legal successor and it relates even to the buying alliances.

It is obvious that the extent of possible illicit conduct of a stronger party in this area is much broader than the intended prohibitions in the draft of the EU Directive on unfair trading practices.

2. Evolution of the SMPA

In order to understand the SMPA now in force, it is necessary to briefly outline its evolution. The concept of significant market power has been debated since mid-nineties and in the past, there were several unsuccessful attempts to adopt some legislation introducing it into Czech legal order (Petr, 2007, p. 5).

It is worth recalling that the SMPA proposal was not drafted by the Government, which is usually the case, but by a group of members of Parliament; indeed, the Government as well as UOHS argued against its adoption.[16] The reluctance to introduce a new kind of regulation without clear boundaries was based mainly on the unreliability of the theoretical basis of economic dependency. It is unclear where it begins and where it ends, which raises doubts about the legitimacy of any measures in this area and leads to a strong tendency to avoid it on the part of regulatory authorities (Scheelings and Wright, 2005, p. 29[17]).

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[14] Act no. 50/2016 Coll.

[15] According to Sec. 9/1 SMPA a legal person shall not be held liable for that provided it proves that it made every effort required to prevent violation of the legal obligation.

[16] The Government's position is available at: http://www.psp.cz/sqw/text/tiskt.sqw?o=5&ct=431&ct1=1 (last visited on 15 September 2018).

[17] Unambiguous and uncompromising as it is, the refusal of this regulation by the Bulgarian Competition Commission of 13 July 2010 in response to the Communication from the Commission of 28 October 2009 on a better functioning food supply chain can serve as *pars pro toto*. It is stated in it that the matters in question fall beyond the protection of competition and hence outside the Commission's competence. According

However, the authors of the SMPA have not avoided it and adopted a seemingly clearer and casuistic regulation through the SMPA, whose economic justification is nevertheless no more precise than 'economic dependency' had ever been. The turnover criterion of CZK 5 billion on the part of the buyer[18] is only a rebuttable assumption deemed to be only one of discretionary indicators of the existence of significant market power (Pokorná and Hanslianová, 2013, p. 12). The decision of UOHS concerning whether or not a buyer wields significant market power is essential; not meeting the turnover limit is not a guarantee of non-intervention and, conversely, excess of the limit does not predetermine that significant market power exists (more analyses and criticism of the current Czech regulation may be read in Bejček, 2016 and in a commetary to the SMPA: Kindl and Koudelka, 2017).

Because it was not a governmental proposal, the SMPA's legislative quality was rightfully criticised (Pelikán, 2009, p. 34 ff.; Bejček, 2014, p. 120–129), but above all, it was not accompanied by any explanatory memorandum. Because of that, the interpretation of the key concept of the act – the significant market power – was subject to completely different interpretations.

In the period immediately after the adoption of the SMPA, academic literature interpreted the significant market power as a kind of economic dependence (Petr, 2010, p. 379, no. 463 and 464). This is also logical with regard to the wording of the respective norm. Significant market power was defined as '*such a position of the buyer vis-à-vis his supplier if, as a result of the market situation, the supplier becomes dependent on the consumer in terms of the possibility of selling his products to the final consumer and the buyer becomes able to enforce unilaterally with respect to the supplier favourable terms and conditions*'.

On this basis and in contrast to the dominant position, which is based on an absolute situation in the market, which applies to all relations of the dominant party, the significant market power was seen as a relative

to the Bulgarian declaration, the concept of significant market power established in numerous EU Member States proved rather ineffective. Special laws introducing such a regulation also entail the risk of an opposite effect on small suppliers they should protect, namely that supermarkets will divert their demand to neighbouring countries with a less stringent regulation and that they will prefer bigger suppliers. It finds a solution in special laws on fair competition, information campaigns and promotion of a code of conduct, as well as in forming professional associations of small suppliers protecting the members' rights and competition rules (cf. http://ec.europa.eu/competition/ecn/brief/04_2010/bg_supermarket.pdf, last visited on 15 March 2012).

[18] Cf. Section 3/3 of the SMPA.

situation that applies only to some specific parties dealing with the buyer. In order to identify a situation of significant market power, it should have been necessary to establish a state of dependency of particular suppliers on the buyer and the ability of the buyer to enforce one-sided favourable business conditions on them. This understanding of the concept of significant market power became known as the 'relative market power'(Pokorná and Hanslianová, 2013, p. 772).

The UOHS nonetheless refused this interpretation. It introduced the concept known as 'absolute market power'(Pokorná and Hanslianová, 2013, p. 772), meaning that once a significant market power of a buyer is established, it applies 'absolutely' to all its suppliers, not 'relatively' to only those economically dependent on it. This decision was successfully challenged before the administrative courts, which admitted that the concept of the significant market power in the SMPA was ambiguous (see below for the respective decisions – chapter II.4).

In the meantime, the SMPA was amended in 2016.[19] As will be described below, the Amendment 2016 abandoned all the references to competition law and, most importantly, changed the definition of the significant market power, according to the explanatory memorandum in order to '*unambiguously enact the concept of absolute market power*'. The adoption of the absolute concept also entails an important consequence related to a shift in the *aim* of the law. This absolute concept has only been adopted for pragmatic reasons at a later stage (because the relative concept would be difficult to apply, and would reduce or even exclude the applicability of SMPA), while the SMPA was originally intended to use the relative concept. Indeed, it can be inferred from the wording of today's SMPA that public-law means are to ensure substantive supervision over the correct relationships between *specific* entities in asymmetrical bargaining positions. However, the 'absolute concept' of significant market power puts into this position each and every buyer who is capable of enforcing unilateral business terms only vis-à-vis certain suppliers. Nonetheless, this line of interpretation assigns him significant market power in respect of all suppliers, even if they are dominant.[20]

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19 Act No. 50/0216 Coll., amending the SMPA.

20 A senior employee of the Czech Office even stated on 12 November 2014 at the St. Martin conference organised by UOHS that, in his opinion, a buyer with a turnover of CZK 5 billion or more can be deemed to have a significant market power in respect of all suppliers and that even a large supplier with a turnover exceeding CZK 5 billion (like Coca Cola and Prazdroj) is not capable of forcing such a buyer into different conditions than small suppliers. This represents a very extensive interpretation of the

The SMPA thus created a legal category of sub-dominant entities (lacking market power stricto sensu) that do not necessarily have to impede competition in terms of its existence but that will carry a 'special public-law-based responsibility'; not because of the competition environment, but for the 'fairness' in dealing with partners. The SMPA thus paradoxically imposes requirements (regarding the contents of contractual arrangements) on entities exercising sub-dominant, yet 'significant', market power that are not required even of dominant competitors.

3. The relationship between public enforcement law and other acts

As the Sec. 1 (1) of the Civil Code underlines, the application of private law is independent of the application of public law. However, this does not mean that the two areas are not intertwined, that they stand isolated from each other, do not interact with each other or mutually impact their application.

The concept behind the SMPA is to regulate contractual relationships between food suppliers and their buyers. It represents strict regulation from which the parties to the supply agreement cannot deviate. The deviation is prohibited by the SMPA even if requested by the supplier, who is the protected party. Hence, the SMPA represents a significant restriction to the freedom of contract.

Freedom of contract also means freedom of the form of contract. The Civil Code requires a particular form of a contract (written form or notarisation) only in exceptional cases, e.g. transfer of ownership of an immovable. Purchase contracts regarding movables (like food) do not require a specific form. Yet, the SMPA requires that any contract concluded between a supplier and a buyer with significant market power in connection with the supplies of food has to be in written form.

Further, one of the leading principles of the Civil Code is the protection of the weaker party, which is seemingly also the fundamental idea of the SMPA. However, the concept of the Sec. 433 Civil Code builds on the particular circumstances of the case where the quality of the weaker party of a person is relative and may change in time (Bejček, 2016, p. 52 ff). In contrast, the SMPA determines in a binding manner, who is the weaker

term 'significant market power' that should, in fact, exist on the part of a demand sub-dominant towards a supply dominant. Czech case law insisted on the relevant concept and nowadays UOHS seems to follow this concept in its approaches, too (see below the comments on recent Czech decision making practice).

party (the supplier) and who the stronger party (the buyer), no matter which of the parties is actually financially or economically stronger or whether the supplier supplies must-have products or holds a dominant position.

There is also an apparent overlap in the regulation of the due-date (see below). Both state that the payment of the price in return for the delivery of goods is due in 30 days since the delivery of the invoice. However, while the regulation in the Sec. 1963 Civil Code is dispositive and only sets a sort of mandatory limits in the form of gross injustice, the limit of 30 days in the SMPA is mandatory regardless of the kind of goods delivered and their storage times.

Since the SMPA's declared aim is not to protect particular individuals directly but the '*creation of a fair competitive environment within certain tight customer-supplier relationships in a defined market segment*'[21] and the '*straightening of the relations between the contracting parties in such a way that the supplier and the buyer negotiate with each other like equivalent partners*', the SMPA interferes with private relationships also in the manner that it renders agreements (particular clauses) that are violating the SMPA null and void (Sec. 588 Civil Code).

We thus consider the SMPA (as it is described below) to be a special public law regulation of unfair trading practices that is simultaneously a special regulation in relation to the Civil Code, especially with respect to the general protection of the weaker party supposed it is a food-supplier. In case of a simultaneous offence under the SMPA and the Civil Code the protection of the weaker party will have two separate lines. Nevertheless, both of them should be applied very cautiously only due to the fundamental importance of contractual freedom.

4. Key enforcement decisions and case law

4.1. Decision-making practice before the Amendment 2016

Albeit the SMPA is in force already since 1 February 2010, UOHS has not issued many decisions although their number is growing since 2016. The scarcity of decisions in the first years of the application of the SMPA was explained by UOHS with the difficulty of its application. Hence, in that period, UOHS issued only a few decisions, out of which only two have become final. One decision (*Ahold*[22]) derives from proceedings that were

[21] Decision of the Chairman of UOHS of 29 May 2012, Ref. No. R169/2011 (*Kaufland*).
[22] Decision of UOHS of 22 August 2011, Ref. No. S167/2010 (*Ahold*).

terminated with a commitments decision in the first instance. Therefore the courts had no opportunity to review UOHS's interpretation of the law and the scope of the text is limited. The other decision (*Kaufland*[23]) – confirmed in the second instance by the Chairman of UOHS – was subject to judicial review. This is the only SMPA decision of UOHS that the administrative courts had ever a chance to review. In fact this case became crucial for the definition of the significant market power.

4.1.1. UOHS's decision-making practice

The first decision of UOHS (*Ahold*[24]) broke with the relative concept of economic dependency and surprised antitrust lawyers with a very strict interpretation. A second decision, regarding the food retail chain Kaufland, followed and went on appeal to the Chairman twice before making it to the administrative courts.[25]

UOHS was at first of the opinion that, since the CZK 5 billion turnover criterion of significant market power is a rebuttable presumption, it is up to the buyer to prove the contrary. Hence, it saw the criterion as a reversal of the burden of proof. UOHS noted that it would be convinced of the non-existence, if according to the criteria of Sec. 3 (2) SMPA (market structure, market shares, financial power, etc.) the situation on the market looked like that it was impossible for the buyer to have significant market power. This reversal of the burden of proof by UOHS was lifted by the appeal decision of the Chairman of UOHS. UOHS had to assess both the turnover as well as the market situation.

According to UOHS, the concept of significant market power was a purely objective concept. If UOHS once classifies the buyer's market position as a significant market power, it will be deemed by UOHS to be unchallengeable to all suppliers irrespective of their market position.

UOHS was of the opinion that the concept of significant market power is not based on the idea of economic dependency and that if one were

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23 Decision of UOHS of 24 April 2013, Ref. No. S160/2010 (*Kaufland*).

24 Decision of UOHS of 22 August 2011 Ref. No. S167/2010 (*Ahold*).

25 Decision of UOHS of 19 July 2011 Ref. No. S160/2010 (*Kaufland*) – not available; overturned by the decision of the Chairman of UOHS 29 May 2012 Ref. No. R169/2011; second decision of UOHS of 24 April 2013 Ref. No. S160/2010; second decision of the Chairman of UOHS of 21 October 2013 Ref. No. R146/2013; quashed by the judgment of the Regional Court in Brno of 21 April 2016 Ref. No. 30 Af 125/2013, which was overturned by the judgment of the Supreme Administrative Court of 31 October 2017 Ref. No. 3 As 88/2016.

to start from the idea of economic dependency, it would mean that legal regulations on prohibited practices would only apply to economically dependent suppliers. This would lead to discrimination against independent suppliers and would have negative consequences for the supply market. UOHS still adheres to this view today.

To that extent, the Chairman of UOHS also confirmed the first instance's considerations when he stated that if one were to start from the concept of individual economic dependency, the buyers would conclude contracts only with large suppliers – even if the smaller supplier with his offer could compete with the bigger one – just to bypass the SMPA regulation.

This interpretation by UOHS was indeed surprising, also with regard to Sec. 3 (1) SMPA expressly referring to a state of dependency and the ability of the buyer to unilaterally negotiate favourable terms and conditions and, and Sec. 3 (2) SMPA to the examination of the market shares and the financial power of the supplier. Further, not long before the Kaufland decision, UOHS stipulated (in a merger decision) that even large grocery retail chains could be dependent on their large suppliers and cannot prevail against them.[26]

4.1.2. The administrative courts' reaction

Kaufland filed a lawsuit against the decision of the Chairman of UOHS. The Regional Court in Brno was surprisingly critical of the SMPA in its judgment.[27]

In essence, the Regional Court said that no method of interpretation (whether linguistic or historical) leads to a clear choice between the relative (dependency) and absolute concept of significant market power. In such a situation, the principle in dubio mitius is applicable because it is linked to a public law sanction. Thus, the concept of significant market power should have been interpreted as relative. The court supported its argument by the fact that in the meantime the Amendment 2016 had been drafted and passed in the Parliament, whose explanatory memorandum stated that the Amendment 2016 seeked to dispel the ambiguity regarding the concept of significant market power.[28]

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26 Decision of UOHS of 12 April 2012 Ref. No. S472/2011 (*Agrofert*/*EuroBakeries*).

27 Judgment of the Regional Court in Brno of 21 April 2016 Ref. No. 30 Af 125/2013 (*Kaufland*).

28 Explanatory memorandum to the amendment of the SMPA (Parliament print 444/0, 7th legislative period), p. 17.

The Regional Court's judgment was quashed by the Supreme Administrative Court,[29] not because it did not agree with the Regional Court on the concept of significant market power, but because the Regional Court did not deal with all Kaufland's pleas.

The Supreme Administrative Court added that, if the objective of the law was the protection of the weaker contracting party and counterbalance the asymmetric bargaining position, then it is a matter of a relationship which should be evaluated on a case by case basis, which would be contrary to the absolute concept of significant market power.

4.2. Decision-making practice after the Amendment 2016

Since the Amendment 2016, UOHS – now also freed of the troublesome prerequisites of 'continuousness' and 'substantial distortion of competition' – issued several first instance decisions, all of which but one were terminated by a commitments decision.[30] In one case UOHS was not willing to allow the party to the proceedings to offer commitments and has issued a first instance decision[31]. However, the decision was quashed on appeal[32] saying that the party should not be banned from the possibility to offer commitments. Several other proceedings are still pending.

III. Nature of infringement and scope of public enforcement

1. Economic agents covered by the law (*ratione personae*)

The SMPA defines two categories of its addressees – the 'suppliers', who are to be protected by it, and the 'buyers', upon whom the act imposes specific obligations. It needs to be observed that the definitions of suppliers and buyers are new as of 2016, when the SMPA was amended.

This Chapter will start with the definition of buyers, as they are the primary addressees of the SMPA, and then go on to the suppliers.

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29 Judgment of the Supreme Administrative Court of 31 October 2017 Ref. No. 3 As 88/2016 (*Kaufland*).

30 Decision of UOHS of 24 July 2017, Ref. No. S128/2017 (*Hruška*); decision of UOHS of 3 August 2017 Ref. No. S161/2017 (*COOP*); decision of UOHS of 3 August 2018 S139/2017 (*Kaufland*).

31 Decision of UOHS of 15 December 2017, Ref. No. S138/2017 (*Globus*).

32 Decision of the Chairman of UOHS of 31 October 2018, Ref. No. R1/2018 (*Globus*).

1.1. Buyers

According to the SMPA, 'buyers' are defined as 'entrepreneurs'.[33] According to the Civil Code, an entrepreneur is '*a person who, on his own account and responsibility, independently carries out a gainful activity in the form of a trade or in a similar manner with the intention to do so consistently for profit*'.[34] Buyers are thus defined as natural or legal persons,[35] i.e. *legal* units, as opposed to 'undertakings', defined by the EU competition law as *economic* units, potentially consisting of several natural or legal persons.[36]

This definition is new as of 2016, when the SMPA was amended. Until then, the buyers had been defined as undertakings, as understood by competition law. Ironically, the (unofficial) translation of the SMPA, published by UOHS,[37] still employs the term 'undertaking'. The reason why the concept of an undertaking has been abandoned is not included in the explanatory memorandum to the Amendment 2016 and it is not discussed in the Information Bulletin of UOHS on significant market power, published in 2016.[38] It is arguably due to the process of separating, both formally and conceptually, the SMPA from the Competition Act (for similar conclusions, see e.g. Kindl and Koudelka, 2017, p. 8).

Despite this conceptual change, the authors do not predict any practical implication of it; even under the original wording of the SMPA, UOHS concluded that the term 'undertaking' contained in the SMPA, despite its explicit reference to the Competition Act in the footnote, is not to be understood as an economic, but rather a legal unit.[39]

Coming back to the definition of buyers, they comprise those entrepreneurs who (i) *buy food for the purposes of its further resale* or (ii) *receive or provide services associated with purchase of food*.[40] 'Food' is defined with reference to the EU law as any substance or product, whether processed, partially

33 SMPA, Section 2 (b).
34 Civil Code, Section 420 (1).
35 Civil Code, Section 18.
36 CJ EU judgment of 12 July 1984 170/83 *Hydrotherm*, ECLI:EU:C:1984:271, point 11.
37 UOHS's translation of the SMPA is available at: http://www.uohs.cz/en/legislation.html (last visited on 15 September 2018).
38 Office's Information Bulletin 2/2016 *Significant Market Power after the Amendment*, available (in Czech only) at: http://www.uohs.cz/cs/informacni-centrum/informacni-listy.html (last visited on 15 September 2018).
39 Decision of UOHS of 24 April 2014, Ref. No. S 160/2010 (*Kaufland*).
40 SMPA, Section 2 (b).

processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.[41]

According to the first part of the definition, buyers are those who purchase food for the purposes of its further sale, i.e. not for their own consumption or further processing. Even though the SMPA is typically associated with supermarket chains,[42] the fact that the food is to be resold to final consumers is not a part of the definition; both retailers and wholesalers are thus covered (for the same conclusion, see Kindl and Koudelka, 2017, p. 10).

More confusing is the second part of the definition, covering those who receive or provide services associated with purchase of food. This part of the definition was added by the Amendment 2016. The UOHS has not yet issued any decision in which the buyer was defined in this way. Concerning the services in question, the explanatory memorandum to the Amendment 2016 states that the term should cover only those services between the supplier (see below) and the buyer which are '*tightly connected with selling or buying of food per se (e.g. marketing fees) which the buyers provide to the suppliers from whom they purchase the food. The term service does not cover provision of electricity, water, heat, rent or other services, not related to the supply of food*'. UOHS added in its explanatory commentaries that this concept is to be interpreted 'restrictively', covering only those buyers '*connected with the demand side in the retail food market*'.[43]

The interpretation suggested in these documents is extremely restrictive and seems to cover only buyers, as described in the first part of the definition (i.e. those who actually purchase the food), and who only receive (i.e. not provide) the services in question; arguably, this is not in line with the wording of the SMPA (those who *receive or provide services associated with purchase of food*), it nonetheless seems to be a meaningful interpretation (for the same conclusion, see Kindl and Koudelka, 2017, p. 13). Conversely, the authors do not believe that there is a case for an interpretation, suggested by UOHS, relating the definition only to retailers; such an interpretation would require a further amendment of the SMPA. As there is no practical experience with this part of the definition, it will however not be discussed any further.

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41 SMPA, Section 2 (d), in conjunction with Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Article 2.

42 And indeed, all the decisions adopted by UOHS so far were addressed to retailers.

43 Office's consolidated explanations to certain problematic provisions of the SMPA, available at: http://www.uohs.cz/cs/vyznamna-trzni-sila/vykladova-stanoviska-a-metodiky/souhrn-vykladovych-stanovisek.html (last visited on 15 September 2018).

In addition to that, as of the Amendment 2016, the definition of buyers covers also buyers' alliances. These are characterized as *groups of buyers established under a contract, another legal act or another legal fact, engaged in collaboration between the buyers in relation to the purchasing of foods for the purposes of resale or receiving or providing services associated therewith, or a group of buyers established for the purposes of such collaboration, regardless of whether this group is or is not a legal entity*.[44]

This definition has been criticised for being too broad and vague (Bejček, 2016, p. 361). UOHS has not yet employed it in practice; it suggested, however, that it might relate to a central purchaser for a group of cooperatives, without finally deciding on this issue.[45] The definition is clearly inspired by 'associations of undertakings' in competition law,[46] it is however broader and includes not only the situations when the buyers are actually engaged in collaboration within the alliance, but also when the alliance was only established in order to do so. It is not specified what kind of cooperation is relevant, whether legitimate or not (Bejček, 2016, p. 361). The wording of the law suggests that the alliance must itself be engaged in purchase of food or receiving services, as discusses above. As there is no practical experience with this part of the definition, it will not be discussed any further.

Finally, buyers are not only the entrepreneurs and alliances discussed above, but also 'anybody' (presumably a legal entity, a natural or legal person) who secures purchases of food or services, as discussed above, for buyers,[47] under a mandate-type contract[48]. This part of the definition was only introduced by the Amendment 2016, and as there is no practical experience with it, it will not be discuss any further.

1.2. Suppliers

The definition of suppliers[49] had also been modified by the Amendment 2016 and the basic characteristics of buyers and suppliers are the same. Thus, suppliers are entrepreneurs, not undertakings (despite UOHS's translation

44 SMPA, Section 2 (c).
45 Decision of UOHS of 3 August 2017, Ref. No. S 161/2017 (*COOP Centrum družstvo*).
46 See also the explanatory memorandum to the Amendment 2016.
47 The wording of the SMPA suggests that such mandataries must themselves be buyers, as they are to secure such purchases and services for *another* buyer.
48 SMPA, Section 2 (b).
49 SMPA, Section 2 (a).

of the SMPA), and the definition itself has two parts, one concerning sales of food and the other provision of services.

Concerning the first part of the definition, it covers all the entrepreneurs selling food for the purposes of its further resale; this clearly mirrors the buyers' definition as it covers sales to all the potential buyers, not only the retailers. In case of more complex distribution chains, the same entrepreneur may thus be at the same time a supplier with regard to its sales and a buyer with regard to its purchases (for the same interpretation, see Kindl and Koudelka, 2017, p. 11).

The second part of the definition is more intriguing. It is identical with the one for buyers, covering those who receive or provide services associated with purchase of food. Clearly, it needs to be interpreted very restrictively, relating only to *provision* of services tightly connected to selling of food to buyers, even though the wording of the SMPA itself would call for a broader, but less meaningful interpretation (Kindl and Koudelka, 2017, p. 11).

1.3. Conclusions to the addressees of the SMPA

Even though the SMPA was amended in 2016 in order to make its wording more precise, the definitions of buyers and suppliers contained in it are rather ambiguous, especially in case of the buyers. They provide room for numerous interpretations and the one presented in this Chapter, which the authors believe to be the most meaningful one, requires ignoring certain parts of explicit legislative provisions.

This situation might have been caused by the fact the basic philosophy of the SMPA, including its scope, has been significantly changed during the legislative process concerning adoption of the Amendment several times (in detail, see Bejček, 2016, p. 360), it is however highly undesirable. The authors therefore suggest that the definition of both the buyers and the suppliers is further amended.

2. Nature of prohibited practices

The prohibited practices constitute an administrative offence prosecuted by UOHS based on no-fault liability. Fault (intent) may be an aggravating circumstance but, in principle, UOHS does not need to examine the buyer's fault. The offence can only be committed by the buyer not by the supplier. The SMPA protects unilaterally suppliers against practices of the buyers, but does not reflect that in specific situations, the buyer may also be in

a state of dependence on a large supplier, especially, if the supplier supplies must-have brands that cannot be sourced from other suppliers.

As with the dominant position, the possession of significant market power in itself is not prohibited and does not constitute an administrative offence of the buyer. The buyer with significant market power may commit two types of offences. Either the buyer commits a 'classical' abuse of significant market power offence (Sec. 4 SMPA) – i.e. negotiating or setting of clauses or conditions or behaviour that are disadvantageous or unwanted by the supplier, or the buyer (or more precisely the contract concluded between him and his supplier) does not fulfil the requirements on essential elements of the contract (Sec. 3a SMPA).

3. Scope *rationae materiae* of the law

First of all, one should remember that the law unilaterally protects only suppliers against buyers, but does not recognise that in certain situations the buyer may also be in a state of dependence vis-à-vis a large or important supplier. Significant market power is defined in Sec. 3 (1) SMPA as a '*position of a buyer, due to which the buyer may enforce an advantage provided by suppliers in connection with the purchase of food, or receive or provide services related to the purchase or sale of food without justifiable cause*.' The goal of the Amendment 2016 was to anchor clearly the absolute concept of significant market power. For this reason, the relationship of the buyer with the supplier disappeared from the definition in paragraph 1, and the dependence of the supplier on the buyer was also deleted. In paragraph 2 (evaluation criteria) the properties (market shares, financial power) of the supplier were eliminated. The Amendment 2016 thus tried to omit the phrases that represented interpretational problems in the sense of the relative concept.

The paragraphs 2–4 of Sec. 3 SMPA, as the definition of dominant position in Competition Act does, contain the interpretational criteria. Paragraph 2 states that the significant market power is assessed in particular in the light of the following criteria: market structure, barriers to entry and financial power of the buyer.

The fourth paragraph then deals with the rebuttable presumption that the buyer, whose net turnover[50] in the sales of food and related services in the Czech Republic exceeded CZK 5 billion (approx. EUR 196 million)

[50] The SMPA says nothing about the net turnover. According to the undisputed interpretation of UOHS, this is the turnover achieved by the competitor in the last

for the last accounting period of 12 months, is in the position of significant market power. In the case of a buyers' alliance, the joint turnovers of the members are calculated. An intermediary (mandate-type contracts – see above) is evaluated together with the buyer for whom he acts. In some circumstances, even though the notion of undertaking is not used in the SMPA, the turnover of the trading subsidiary and its parent company can be calculated together.

When using the definition, UOHS proceeds as it does with dominance. First, it looks whether the buyer does not fall within the safe-harbour, that is at the turnover. If the criterion of turnover is met, the UOHS checks whether the criteria of paragraph 2 are not contrary to the position of significant market power after all. However, it is not excluded that a buyer with a turnover of less than CZK 5 billion may also be considered a buyer with significant market power. Nevertheless, this option is less probable.

According to UOHS, the substance of the assessment of market power is '*not the assessment of one or more business relationships between the buyer and his actual suppliers, but the question of whether his conduct can jeopardize an indefinite number of such relationships. It is also important to note the fact that the position of the supplier may change as the relationship develops, and it is therefore difficult to imagine that it would be real at any moment to judge whether the supplier is in a position where the retail chain must act in accordance with the law or not. Firstly, it would put a huge burden on the supplier's position assessor, but much more significant is the fact that such a condition would necessarily lead to legal uncertainty for all contracting parties*.'[51]

With this interpretive note, UOHS revealed the real reason for its plea for the absolute concept. It is impossible for the agency with its resources to assess whether or not a specific supplier is in a dependency position with his buyer. However, this condition is in contradiction to actual market facts, as there are also large (often multinational) companies on the supplier side.

According to the commentary literature, it is also possible to interpret the current regulation less strictly (that is, with a relative corrective). Even the commentary works with the idea that a strict absolute concept does not meet the purpose of the law. The commentary therefore suggests that, while the significant market power is an objective feature of the buyer, the buyer does not have it over those suppliers who are proven of having

completed accounting period. It uses the definition of the law no. 563/1991 Coll., on bookkeeping.

51 Informační list ÚOHS 2/2016 Významná tržní síla po novele zákona, p. 4.

a stronger or at least the same strong position as the buyer (Kindl and Koudelka, 2017, § 3, no. 16).

In one of the new decisions (*Globus*[52]), the Chariman of UOHS agreed with the commentary's view, and added that this relative corrective shall be applied only if the buyer expresses objections to the presumption of significant market power and provides evidence to the contrary during the proceedings.

4. Subjective scope of enforcement – 'excessive bargaining power', general prohibition and enumerative list of prohibited practices

The concept of the Sec. 3a SMPA is based on an enumerative list of formal prerequisites that must be met by the contract between a supplier of food and a buyer with significant market power. Sec. 4 (1) SMPA sets a general prohibition of the abuse of significant market power ("Abuse of significant market power is prohibited."), while Sec. 4 (2) SMPA gives an exemplified list of most common unfair trading practices (as considered by the legislator).

4.1. Obligatory elements of a buyer-supplier contract

Sec. 3a SMPA places certain requirements on the form and content of contracts between buyers and suppliers of food. The purpose of this provision is actually to prevent the abuse of significant market power and to facilitate the enforcement of the law by UOHS.

4.1.1. Obligatory written form (Sec. 3a SMPA)

The SMPA prescribes the written form of all contracts and agreements between the supplier and the buyer. The Civil Code does not require any formalities when concluding such contracts. Many agreements that harmed the suppliers before the Amendment 2016 were allegedly concluded orally, which made it difficult for UOHS to prove their existence. For this reason, since the Amendment 2016, all agreements must comply with this form requirement. UOHS also requires that the particular purchase contracts (i.e. the order and its acceptance) are in writing.

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[52] Decision of the Chairman of UOHS of 31 October 2018, Ref. No. R 1/2018.

In one of the few decisions of UOHS after the Amendment 2016, the lack of a written form was a key charge against Hruška, a smaller retail chain with annual turnover for the sale of food of approx. CZK 6 billion. Hruška ordered operational deliveries of fresh food by phone. The procedure was terminated with commitments.[53] Hruška committed, among others, to make all orders only in writing in the future.

4.1.2. Requirements concerning the purchase price (Sec. 3a (a) SMPA)

The contract must include the following information regarding prices:
- due-date for the payment for goods, which may not exceed 30 days from the date of receipt of the invoice;
- form of payment (in particular the specification whether cash or electronic);
- specification of discounts;
- amount of any payments by the supplier, which in their sum may not exceed 3% of the annual turnover of the supplier with the particular buyer.

The 30-day due-date limit was enforced since the first introduction of SMPA. All proceedings initiated by UOHS prior to Amendment 2016 acomprised the violation of the due-date limit.[54]

The three percent limit on additional services was inserted into the SMPA during deliberations in the Parliament and is probably one of the biggest problems of the SMPA. It concerns payments of the supplier for various services, which the buyer provides to him. In particular, it involves various marketing services, but also transport or storage (of products that the supplier supplies to other customers).

The limit is not only problematic because it is very difficult to estimate the correct total amount of payments and, thus, to terminate the provision of services at the right moment. However, for the estimation, UOHS allows the turnover from last year to be used, or – if there was no such turnover – to take the expected turnover.[55] The real problem, however, is the fact that the larger suppliers in some cases order extensive marketing campaigns with the buyers. If the supplier has several such campaigns during one year, in total, they exceed the specified limit. For them, however, the limit also applies against their will.

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53 Decision of UOHS of 24 July 2017, Ref. No. S 128/2017 (*Hruška*).

54 See decision of UOHS of 22 August 2011, Ref. No. S167/2010 (*Ahold*); decision of UOHS of 24 April 2013, Ref. No. S160/2010 (*Kaufland*).

55 Informační list ÚOHS 2/2016 Významná tržní síla po novele zákona, p. 10.

4.1.3. Performance time and quantity (Sec. 3a (b) SMPA)

The contract between the buyer and the supplier must also include the delivery time and the method of its determination, the determination of the delivery quantity within a set period or particular deliveries. The reason for this rule is to guarantee that the supplier will not be forced by the buyer to deliver any unforeseen or inadequate deliveries in unreasonably short delivery times (Kindl and Koudelka, 2017, § 3a, no. 75).

4.1.4. Services related to the purchase or sale of food (Sec. 3a (c) SMPA)

If services are agreed between the buyer and the supplier, the way of their cooperation must also be determined. It is necessary that the supplier and the buyer agree upon the object, the scope, the way and the time of the service, the price level and the method of its determination.

4.1.5. Guaranteed purchase price (Sec. 3a (d) SMPA)

The contract must include a period of a guaranteed purchase price, which may not be longer than three months from the first delivery of the product concerned.

The purpose of this rule is to prevent the situation where the supplier is forced to supply the customer for a long-term price.[56] The rule is not intended to imply that the contract between the buyer and the supplier should under any circumstances include a provision on the price guarantee. It is sufficient if the contract adequately limits the price guarantee period.

4.1.6. Method of the assignment of claims (Sec. 3a (e) SMPA)

Finally, the contract must include an agreement regarding the manner of assigning the claim. This is determined by the relevant rules of the Civil Code. The UOHS defines this provision in such a way that the parties may not deviate from the dispositive rules of the Civil Code.[57] Otherwise the provision, according to UOHS, would have no meaning.

This provision responds probably to situations, in which UOHS considered the terms, on which the contracts with the buyer made the

[56] Office's consolidated explanations to certain problematic provisions of the SMPA, available at: http://www.uohs.cz/cs/vyznamna-trzni-sila/vykladova-stanoviska-a-metodiky/souhrn-vykladovych-stanovisek.html (last visited on 15 September 2018).

[57] Informační list ÚOHS 2/2016 Významná tržní síla po novele zákona, p. 11.

supplier's right to assign their claims conditional, to be inappropriate.[58] Therefore, the parties must not prohibit the supplier from assigning the claim or make it subject to certain conditions.[59]

4.2. Prohibition of the abuse of significant market power

Sec. 4 (1) SMPA contains the general clause of the prohibition of abuse. Sec. 4 (2) SMPA lists, by way of example, abusive practices.

4.2.1. Negotiating and implementing contractual terms which create a significant imbalance in the rights and obligations of the parties (Sec. 4 (2) (a) SMPA)

Above all, the SMPA prohibits such contractual conditions that lead to a considerable imbalance in the rights and obligations of the parties. The commentary literature refers to the similarity of the wording with the wording in Sec. 11 (2) (a) APC (abuse of the dominant position) and the wording in Sec. 433 of the Civil Code (abuse of dependence of the weaker party by an entrepreneur) and argues for a corresponding interpretation of the provision of the SMPA (Kindl and Koudelka, 2017, § 4, no. 21; Bejček, 2016, p. 343).

The SMPA demands that the imbalance is similar to that in the Civil Code. The imbalance should therefore be unlawful only if it is obvious and unfounded (especially, if not compensated otherwise) (Kindl and Koudelka, 2017, § 4, no. 22). In this line, the whole complex of the contract has to be evaluated, not just the isolated provision, which seems to be detrimental to the supplier. An example could be the transfer of a risk to the supplier without adequate compensation.

UOHS lists as an example contractual provisions that make it impossible for the supplier to reject orders.[60]

In its decision-making practice prior to the SMPA amendment, UOHS saw the imbalance in the following practice:

– combination of cash discount and a penalty for the assignment of claims: UOHS considered the combination of a cash discount (financial reward for the payment of the price before the agreed due date – in this case in the amount of 0.5% of the sum demanded for each started week by which was paid earlier) and a 'sanction' for the assignment of

[58] See decision of UOHS of 24 April 2013, Ref. No. S160/2010 (*Kaufland*).
[59] See decision of UOHS of 24 July 2017, Ref. No. S 128/2017 (*Hruška*).
[60] Informační list ÚOHS 2/2016 Významná tržní síla po novele zákona, 15.

the claim of the supplier to a third party (here in the amount of 4% of the requested sum) imposing of obligations on the supplier, which is a gross mismatch between the positions of the parties.[61]

After the Amendment 2016, UOHS found imbalance in the following practice:

– restriction of set-off by the supplier: In the context of the purchase contracts for 2016, the buyer negotiated with his suppliers a provision according to which the supplier was entitled to unilaterally offset the claim against his buyer, assign or pledge it to third parties, or otherwise debited only with the consent of the customer. In the event of a breach of this provision, it was determined that the legal transaction contrary to the contract is invalid. In addition, a one-sided contractual penalty of 30% of the unilaterally offset, ceded, suspended or otherwise debited claims has been agreed.[62]

4.2.2. Negotiating or obtaining any payment or other performance for which no service or other consideration was provided, or is disproportionate to the value of the actual consideration (Sec. 4 (2) (b) SMPA)

In cases of alleged disproportionate consideration, as in the case of the previous practice, the whole contractual complex must be investigated. The provision should apply, in particular, to cases in which the buyer requests ad hoc monetary or in kind contributions from the suppliers, which would oblige him to make no or only a symbolic consideration.

These services can take various forms, such as discounts for marketing campaigns whose value does not correspond to the amount of the discount, or even discounts, without any consideration. However, the disproportionality must be reliably ascertained, the eventual compensation can be hidden in advantageous terms and conditions of the contract.

The value of the consideration is determined by UOHS according to the market price, which it determines by means of market participant surveys.[63]

In its decision-making practice prior to the SMPA amendment, UOHS considered the disproportionality in the following practice:

– disproportionate cash discount: The customer requested a discount from its suppliers in an amount that did not correspond to the shortening

61 Decision of UOHS of 19 July 2011 Ref. No. S160/2010 (*Kaufland*) – not available; decision of the Chairman of UOHS of 29 May 2012 Ref. No. R169/2011 (*Kaufland*).

62 Decision of UOHS of 24 July 2017 Ref. No. S128/2017 (Hruška).

63 Cf. decision of UOHS of 19 July 2011 Ref. No. S160/2010 (*Kaufland*).

of the payment period (the amount is subject to trade secrecy). UOHS determined the proportionality of the amount of the cash discount using the annual interest. It was based on the idea that the early payment corresponds to a grant of funds by a financial institution. UOHS therefore calculated an annual interest rate that would correspond to the amount of the cash discount on the individual invoices and the number of days of early payment. UOHS then compared the annual interest rate calculated in this way with the annual interest rate used by the financial institutions. Thus, UOHS concluded that the amount of the cash discount does not correspond to the consideration granted by the buyer.

UOHS also found that the buyer was completely arbitrary in demanding the discount. The supplier could in no way influence the number of days of early payment. In many cases, UOHS found out that a cash discount was demanded for one to two days before the due date.[64]

Following the Amendment 2016, UOHS concluded that it was disproportionate in the following case:

– in December 2016, a buyer sent a letter to at least 231 food suppliers requesting a 2% reduction in the base prices of traded products, under the threat of delisting 30% of the co-traded product range. In the same letter, he asked the suppliers who did not agree with the proposed price reduction to prepare and deliver a price monitoring of the remaining product range on the Czech market, without this service being agreed in written form in the contract. Whereby the price monitoring was regarded as a service of the supplier without consideration of the customer.[65]
– UOHS also determined that using a third party for such purpose can be considered an abuse of significant market power. The buyer asked the suppliers to use an invoicing and payment system operated by a third party. The suppliers have paid also for services that had no or little value to them, while the services provided to the buyer had value for him. However, the buyer did not pay for the services provided to him. UOHS concluded that the suppliers have paid for the services the third party provided to the buyer.[66]

64 Decision of UOHS of 22 August 2011 Ref. No. S167/2010 (*Ahold*).
65 Decision of UOHS of 3 August 2017 Ref. No. S161/2017 (*COOP*).
66 Decision of UOHS of 3 August 2018 S139/2017 (*Kaufland*).

4.2.3. Implementing or obtaining any payment or discount, the amount of which, or the purpose and scope of the provided consideration for this payment or discount, was not agreed in writing prior to the delivery of the food or provision of services, to which the payment or discount relates (Sec. 4 (2) (c) SMPA)

This practice aims at such practices that consist of the implementation of selected agreements that do not fulfil the formal requirements of the SMPA (Kindl and Koudelka, 2017, § 4, no. 35). These requirements are to be found in the Sec. 3a (a) and (c) SMPA (see above).

4.2.4. Negotiating and implementing any pricing conditions due to which the tax document for the payment of the purchase price for the delivery of food does not contain the final purchase price after all agreed discounts on the purchase price, with the exception of pre-negotiated volume discounts (Sec. 4 (2) (d) SMPA)

This provision aims at demanding of ad hoc discounts without an adequate trade-off by the buyer on the already issued and often already paid invoices. Hence, the SMPA prohibits above all retroactive discounts; it is forbidden to charge retrospectively and retroactively discounts on purchase prices for food. However, the SMPA recognizes an exception -- volume discounts because the existence and the amount of the discount becomes known only after the expiration of a certain period in which it was ordered and paid.

UOHS initially defined these volume discounts as sales discounts, since these are due to the fulfilment of agreed sales targets.[67] According to UOHS, they cannot be part of current invoices because of their nature, they can only be determined when the goal is reached. The amount of the agreed subsequent discounts must be in an economically justified objective amount. Again, the amount of the rewarded revenue may not be the usual amount, otherwise there would be no consideration in the form of increasing the revenue for the discount. The sales target to be rewarded must therefore be at least the same amount or higher than the sales that the customer has achieved in the last comparable period.

In its more recent interpretation, UOHS interprets volume discounts more broadly and the performance to be rewarded is the economies of scale.

[67] Informační list ÚOHS 2/2016 Významná tržní síla po novele zákona, p. 11.

4.2.5. Negotiating and enforcing payments or other performance for accepting products for sale (Sec. 4 (2) (e) SMPA)

This provision prohibits listing fees that were relatively common in this industry and are still used in the non-food sector. The reason for the existence of the listing fees is the fact that the introduction of new goods into the retail chain is often associated with costs (in particular administrative costs and marketing costs).

The prohibited listing fees need not be straightforward. In its recent decision in the case of Kaufland, UOHS determined that also the conditioning of the mutual cooperation with the conclusion of a contract against payment with a third party can be considered as enforcing payments for the possibility to supply the buyer's shops. The buyer had asked the suppliers to use an invoicing and payment system operated by a third party for which the suppliers had to make payments to the third party.[68]

4.2.6. Negotiating and implementing the maturity of the purchase price for food longer than the time specified in Sec. 3a (a) (Sec. 4 (2) (f) SMPA)

The SMPA not only prohibits the agreements of due dates that exceed 30 days, but also payments that exceed 30-day periods. According to the commentary literature, the SMPA is opposed to the regimes in which the invoice is delivered after the goods have been delivered, too (Kindl and Koudelka, 2017, § 4, no. 57).

In its decision-making practice prior to the Amendment 2016, UOHS found disproportionality in the following practice:

– agreeing and practicing a term of payment that exceeds 30 days: if a term of payment has been agreed by the customer for more than 30 days and has actually been complied with, UOHS only considers it a violation of the prohibition of the agreement; the breach in the form of actual non-compliance was consumed;[69] this conclusion is, according to the commentary literature, applicable even after the Amendment 2016 (Kindl and Koudelka, 2017, § 4, no. 53); however, it must be noted that, in the quoted case, not all suppliers had a payment period of more than 30 days; each supplier had an individual payment period depending on the type and value of the goods and the amount of the price he wanted to achieve.

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68 Decision of UOHS of 3 August 2018 S139/2017 (*Kaufland*).

69 Decision of UOHS of 19 July 2011 Ref. No. S160/2010 (*Kaufland*) – not available; decision of the Chairman of UOHS of 29 May 2012 Ref. No. R169/2011 (*Kaufland*).

Nevertheless, this rule is somewhat restrictive, especially for non-perishable foods that are often sold for a very long time after delivery.

4.2.7. Negotiating and exercising the right to return purchased food with the exception of a substantial breach of contract (Sec. 4 (2) (g) SMPA)

The purpose of this provision is to exclude the practice where the buyer has ordered too many items and simultaneously transfers the risk of the inability to sell the food ordered to the supplier.

The rule does not apply if the buyer returns the goods due to a material breach of contract. But the SMPA does not say in which cases it comes to a fundamental breach of contract. The only thing that can be pointed out right now is the rule on the fundamental breach of contract in the dispositive Sec. 2002 Civil Code.

4.2.8. Seeking compensation for sanctions imposed by the inspection authority from the supplier without the existence of its fault (Sec. 4 (2) (h) SMPA)

The purpose of this provision is to prevent practices where buyers transfer fines imposed on the buyers by inspection authorities in connection with the sale of food for the buyer's own wrongdoing. However, the norm goes beyond this purpose. The reason for this is the requirement of fault on the side of the supplier. No fault is required for the imposition of the fine by an inspection authority. Thus, according to the wording of the SMPA, if the offence is imputable to the supplier but no fault can be proven to him, the sanction remains with the buyer. The commentary literature, therefore, proposes to read the provision without the fault (Kindl and Koudelka, 2017, § 4, no. 68).

4.2.9. Discrimination against the supplier consisting of arranging and implementing different contractual terms for the purchase or sale of services related to the purchase or sale of food with comparable performance, without justifiable cause (Sec. 4 (2) (i) SMPA)

The principle of non-discrimination applies only to the conditions of providing and receiving services (for example marketing or logistics services). It is not applicable to the purchase of food.

The provision primarily requires that, in particular, the price conditions are stipulated with regard to transparent economic criteria. Thus, it could be problematic if the price for otherwise matching marketing services was tied to the turnover of the supplier with the buyer.

4.2.10. Conducting an audit or another form of control of the supplier by the buyer or a natural person or legal entity authorised by the buyer at the cost of the supplier, including demands for food analyses at the cost of the supplier (Sec. 4 (2) (j) SMPA)

According to UOHS, the purpose of this provision of the law is to prevent the buyer from acting in a manner that would lead to unjustified requirements unilaterally enforced and applied at the expense of the supplier. The buyer is only entitled to demand that the supplier only submits documents (certificates, etc.) to which the supplier is obliged to comply within the scope of his activities, for example due to other statutory provisions.[70]

4.2.11. The buyer's failure to respect the results of official inspections of food conducted by the state surveillance authority (Sec. 4 (2) (k) SMPA)

Unfortunately, there is no further interpretation of this provision, not even by UOHS. Hence, it is hard to say which authorities and what controls are meant by this provision. In extreme cases, the provision could be understood as prohibiting the buyer from defending himself against the controls carried out in his premises and the subsequent proceedings (Kindl and Koudelka, 2017, § 4, no. 86).

4.2.12. The catch-up provision of the general clause (Sec. 4 (1) SMPA)

The catch-up provision of the general clause should only be applied restrictively, as, due to the vagueness of the clause, the sanctioning might be considered as unconstitutional.

UOHS has already listed a possible practice that could fall under the general clause. It is the sale (to end-customers) below the purchasing price if, eventually, this would lead to the purchase of food from suppliers for prices that do not cover all the suppliers' costs.[71] However, purchasing below costs is already covered by the Price Act.

According to the commentary literature, the general clause could also encompass the practices listed in the Commission's Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe and in the Communication from the Commission on

[70] Office's consolidated explanations to certain problematic provisions of the SMPA, available at: http://www.uohs.cz/cs/vyznamna-trzni-sila/vykladova-stanoviska-a-metodiky/souhrn-vykladovych-stanovisek.html (last visited on 15 September 2018).

[71] Informační list ÚOHS 2/2016 Významná tržní síla po novele zákona, p. 11.

combating unfair trading practices between food business operators (Kindl and Koudelka, 2017, § 4, no. 15).

The proposed directive on unfair trading practices in business-to-business relationships in the food supply chain also contains practices that are not regulated in the SMPA and could be encompassed by the general clause:

– the buyer cancels the purchase of perishable food products on such short notice that a supplier cannot reasonably be expected to find an alternative marketing or use possibility for those products;
– the buyer unilaterally and retroactively amends the terms of the supply agreement in terms of frequency, time or scope of supply, quality standards or prices for the food products;
– the supplier pays for the waste of food products, which occurs on the premises of the buyer and is not caused by negligence or fault of the supplier.

5. Further conditions for the application of the SMPA

The version of the definition of the abuse of significant market power from before Amendment 2016 contained two more requirements. The infringement had to be 'continuous' and its purpose or consequence had to be a significant restriction of competition in the relevant market. These requirements were removed from the SMPA with the Amendment 2016. The explanatory memorandum to the Amendment 2016 says that the reason for the removal of the anti-competitive requirement is that the antitrust law does not recognize such a requirement in the case of abuse of the dominant position.

Thus, according to the legislator, it would be illogical if the unlawfulness of the act of a person with a weaker market power required proof of greater effect. This just shows the misunderstanding of competition law by the legislator and/or the inability of UOHS to prove that the practices prohibited by the old version of the SMPA were able to restrain competition. From the statements made by UOHS during proceedings before the Amendment 2016, it follows that the very reason for the removal was the practical procedural impossibility to prove any impact of (even if unfair) behavior of subdominant food chains as buyers on competition in the relevant market.[72]

UOHS examined the anticompetitive effect of the practices before the Amendment 2016 only very briefly. As far as the condition of 'continuousness'

[72] Cf. decision of UOHS Ref. No. S23/2011 (*Globus*) – the decision was removed from UOHS's webpage as it was quashed by the Chairman of UOHS and the proceedings were discontinued later.

is concerned, UOHS did not understand this in the sense of the temporal aspect, but in the sense of the quantitative aspect, that is that the practice had to affect several suppliers. UOHS did not reveal how many suppliers this had to be. The criterion of 'continuousness' was removed from the SMPA with the Amendment 2016, as well as of restriction of competition However, according to contemporary commentary literature, the aspect of quantitative continuousness has remained in the SMPA. The law uses the verbs in their imperfect aspect in the exemplary enumeration of the prohibited practices. From this it is deduced that the SMPA continues to demand a repetition of the practice (Kindl and Koudelka, 2017, § 4, no. 9). In recent decision-making practice, UOHS says the law requires that at least two suppliers be affected.[73]

Furthermore, the conduct of the buyer should have the character of social harm. This is a general requirement for all offences (Sec. 5 of the Act on Administrative Offences[74]), whereby the harmfulness should always be evaluated with regard to the object and purpose of the law. In the case of the SMPA, therefore, the harmfulness to the relationships between buyers and suppliers should be taken into account.

IV. Public enforcement institution and proceedings

Whereas in the area of material law, the SMPA has been conceptually separated from the Competition Act, as far as the procedure is concerned, the rules concerning application of both of these acts are practically identical.

1. Institution in charge of public enforcement

The SMPA is enforced by UOHS.[75] THE UOHS is a central administrative body,[76] which means that it is not subject to any of the ministries, but it is on the same level with them, and that UOHS's Chairman has the same statutory powers as ministers of the Government. This position is not unique

[73] Cf. decision of UOHS of 15 December 2017 Ref. No. S138/2017 (*Globus*) – the full wording of the decision was not published as it was appealed by the party to the proceedings.

[74] Act no. 250/2016 Coll., on Administrative Offences.

[75] SMPA, Section 5.

[76] Act No. 2/1969 Coll., on creation of ministries and other central administrative bodies of state administration of the Czech Republic, as amended, Section 2(1).

to UOHS; other highly specialized agencies in the Czech Republic possess it as well, for example the sector regulators responsible for electronic communications or energy.

The UOHS was created in 1996 by the Scope of Competence Act.[77] According to this act, the main aim of UOHS is to support and protect competition.[78] Apart from the enforcement of competition law (agreements, abuse of dominance and mergers), UOHS is also active in other areas, broadly connected with undistorted competition: it is a central coordinating, advisory, consulting and monitoring authority in the area of state aid[79] and the supervisory authority for public procurement.[80] Since 2012, UOHS has also been allowed to exercise supervision over bodies of public administration in order to determine whether their activity restricts competition.[81]

UOHS is headed by Chairman who is appointed by the President of the Czech Republic upon the Government's proposal.[82] The term of office of the Chairman is six years,[83] with a maximum of two terms.

The Chairman is assisted by three Vice-Chairmen, acting as his deputies. They are appointed and recalled by the Chairman who specifies their tasks.[84] Typically, one of the Vice-Chairmen is responsible for competition law and policy, the other for supervision over public procurement and the third for a peculiar mix of competences including state aid, significant market power and legislation.[85] Thus, competences connected with competition law, on the one hand, and with significant market power, on the other, are entrusted with different people within different organizational structures of UOHS.

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77 Act No. 273/1996 Coll., on the Scope of Competence of UOHS for the Protection of Competition, as amended. Before that, UOHS used to be a ministry, headed by a member of the Government.

78 Scope of Competence Act, Section 1(1).

79 See No. 215/2004 Coll., on Regulation of Relations in the Area of State Aid and on Amendment to the Act on the support of Research and Development, as amended.

80 Act. No. 134/2016 Coll., on Public Procurement, as amended.

81 Competition Act, Section 19a.

82 Scope of Competence Act, Section 1(3).

83 *Ibid.*, Section 1(5).

84 *Ibid.*, Section 1(10).

85 The internal organization of UOHS is not set by a law, but determined by the Chairman. Current structure of UOHS is available in English at: http://www.compet.cz/en/about-the-office/structure-of-the-office/ (last visited on 15 September 2018).

2. Type and principles of proceedings (administrative, decision-making, due process, judicial review)

UOHS is an administrative body. It investigates the putative infringements as well as decides on them, including the imposition of sanctions; its decisions are then reviewed by administrative courts.

Proceedings before UOHS are governed by the Administrative Proceedings Code[86] and the Act on the Liability for Infractions.[87] These are general pieces of legislation, governing the conduct of all administrative bodies in the Czech Republic. In addition to that, specific provisions concerning application of the SMPA are included in that act itself.

It is worth mentioning that originally, the SMPA had not contained any procedural provisions and only referred to the Competition Act, whose specific procedures were to be employed for the purposes of SMPA as well. This is still the case today, but the Amendment 2016 transposed some (but not all) of the Competition Act's procedural provisions into the SMPA itself.

2.1. Administrative proceedings

UOHS initiates investigations on its own motion (ex officio);[88] the investigation itself is carried out by UOHS's employees from a dedicated department dealing only with significant market power cases. The investigative powers are outlined in the Competition Act,[89] and without going into details, they resemble those of the European Commission in antitrust cases according to the Regulation 1/2003.[90] After the investigation is finished, UOHS issues a statement of objections.[91]

At the end of the proceedings, UOHS decides whether there was an infringement; if there was, it declares so and prohibits the conduct for the future.[92] It may also decide on remedies[93] and sanctions (see below). Alternatively, a commitments decision, similar to the one under the

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86 Act No. 500/2004 Coll., Administrative Proceedings Code, as amended.
87 Act No. 250/2016 Coll., on the Liability for Infractions.
88 Competition Act, Section 21 (1).
89 Competition Act, Sections 21e to 21g.
90 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
91 Competition Act. Section 21b.
92 SMPA, Section 6 (1).
93 SMPA, Section 6a. Presumably, only behavioural remedies may be imposed; for the same interpretation, see Kindl and Koudelka, 2017, p. 134.

Regulation1/2003,[94] may be adopted.[95] Indeed, vast majority of decisions adopted by UOHS so far have been commitment decisions.[96]

These Office's decisions can be appealed to the Chairman.[97] Before deciding, the Chairman is advised by the appellate committee,[98] an advisory body composed of employees of UOHS (not involved in the proceedings) and outside experts. The appellate committee makes a recommendation to the Chairman, who is not not bound by it and may decide as he finds appropriate.

The Chairman may either confirm the decision and reject the appeal or overrule the decision and either stop the proceedings entirely or return the case to the dedicated department, which will continue the investigation and eventually issue another decision, which may again be appealed. If appropriate, the Chairman may also modify the decision, for example increase or decrease the fine. The decision of the Chairman is final and enforceable, and may only be appealed to the court.

All the decisions of UOHS are (in non-confidential version) published on Office's website.[99] The confidential versions are sent only to the parties to the proceedings.

2.2. Judicial review

The power to review the final decisions of UOHS (i.e. decisions issued by the Chairman) is entrusted to the administrative courts. The action may first be lodged with the Regional Court in Brno, within two months after the decision was issued by UOHS.[100] It ought to be mentioned that the decisions of UOHS are enforceable even when being reviewed by the court. Simultaneously with the action, the petitioner may however ask the court to award suspensory effect to the action, removing (until the court finally decides) all the legal effects of the decision.[101]

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94 Regulation 1/2003, Art. 9.

95 SMPA, Section 6 (2).

96 Commitment decisions have been adopted in 4 out of 5 cases published by UOHS in the years 2009 – 2018.

97 Administrative Proceedings Code, Section 152 (1).

98 Administrative Proceedings Code, Section 152 (3).

99 The decisions are available (in Czech only) at: http://www.uohs.cz/cs/vyznamna-trzni-sila/sbirky-rozhodnuti.html (last visited on15 September 2018).

100 Act No. 150/2002 Coll., Code of Administrative Justice, as amended (hereinafter referred to as 'Code of Administrative Justice'), Section 72.

101 Code of Administrative Justice, Section 73.

Against the decision of the Regional Court, it is possible to file a cassation complaint to the Supreme Administrative Court. Both UOHS and other parties to the proceedings before the Regional Court may file it within two weeks after the lower court had issued its judgement.[102] Unlike before the Regional Court, that reviews both the matters of law and fact, only matters of law may be claimed before the Supreme Administrative Court.[103]

Against the judgment of the Supreme Administrative Court, it is finally possible to file a constitutional complaint addressed to the Constitutional Court, if the fundamental constitutional rights of the parties were allegedly breached.[104]

Judgements reviewing UOHS's decisions are published on the authority's website in a non-confidential version.[105]

2.3. Due process

All the traditional fair trial guarantees are applicable in proceedings concerning significant market power. As the number of decisions is very limited in this area, there is no case-law concerning specifically the application of the SMPA, the courts have however stated this repeatedly with regard to the Competition Act, including the fact that the European Convention on Human Rights applies to such proceedings.

3. Fines and other sanctions

The only type of sanctions envisaged by the SMPA is a fine to the buyer, which may amount to either CZK 10 million (approximately EUR 400,000) or 10% of the net annual turnover achieved by the buyer in the last closed accounting period. There is currently only one decision published by UOHS in which a fine was imposed.[106] The fine amounted to CZK 22.8 million (less than EUR 1 million) and was calculated as 0.05% of the buyer's annual turnover in the relevant market.

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[102] *Ibid.*, Section 106.

[103] *Ibid.*, Section 103.

[104] Act. No. 182/1993 Coll., on the Constitutional Court, as amended, Section 72 et seq.

[105] The judgments are available (in Czech only) at: http://www.uohs.cz/cs/vyznamna-trzni-sila/soudni-prezkum-rozhodnuti.html (last visited on 15 September 2018).

[106] Decision of UOHS of 24 April 2013, Ref. No. S160/2010 (*Kaufland*), upheld by the decision of the Chairman of UOHS of 21 October 2013, Ref. No. R146/2013 (*Kaufland*).

The calculation was based on the methodology for fining competition law infringements.[107] In 2018, a new methodology for setting fines was published[108] and it will presumably be used in SMPA cases by analogy as well. The new methodology employs the same procedure, but significantly increases the parameters used to determine the amount of fine. It starts with a certain percentage (currently up to 10%, originally 3%) of the turnover in the relevant market,[109] multiplies it by the factor of time (currently up to 10, originally up to 3 for infringements exceeding 10 years)[110] and finally increases or decreases the fine by up to 70% (originally 50%) by taking into account aggravating[111] or mitigating circumstances.[112]

V. Conclusions

Czech regulation of significant (yet not dominant) market power experienced a turbulent development, both in the legislature itself and in its interpretation and in its use. Two kinds of buying (demand) power have been discerned: market power (stricto sensu), and bargaining power. The former is an explicitly objective antitrust- law- related term, whereas the latter is a more or less intuitively anticipated term that depends rather on economic context.

Despite that, bargaining power in terms of significant market power originally used to be interpreted as an objective concept by the Czech Office for Protection of Competition unlike the Czech court that asserted a subjective (individual) approach and referred to the wording of the SMPA. This subjective position stands for an inquiry of a particular relationship, unlike the objective concept that relies on legally set criteria of significant market power. Meeting these criteria means that the buyer's power will be assessed as significant towards all commercial relations between him and all of his suppliers (which is the recent Czech written law approach).

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107 The original Guidelines on the method for setting fines are still available (in English) at: https://www.uohs.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines.html (last visited on 15 September 2018).

108 The new Guidelines on the method for setting fines (hereinafter referred to as 'Fining Guidelines') are available (in Czech only) at: https://www.uohs.cz/cs/legislativa/hospodarska-soutez.html (last visited on 15 September 2018).

109 Fining Guidelines, point 3.19.

110 *Ibid.*, point 3.24.

111 *Ibid.*, point 3.28.

112 *Ibid.*, point 3.27.

This objectivised stance towards significant market power may be labelled as 'qualified subdominance'.

Subsequently, after the amendment of the SMPA came into force, explicitly anchoring the objective concept, UOHS slightly shifted, paradoxically, to a more nuanced and individualized (subjective) concept.

Recently, significant market power is from the legal viewpoint an objective and non-individualised position of retail chains on the specific market (as a consequence of the wording of the written law) but contemporary 'law in action' tends to be more reluctant to such a strict and mechanical attitude. More realistic and subject-related approach is preferred in terms of individual economic dependence evaluated on a case-by-case basis, which is contrary to the absolute concept of significant market power. This positive development is in accordance with the more economic approach to enforcement.

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ESTONIA

I. Introduction

Similarly to many other European countries significant changes have taken place in the food supply chain in Estonia over the past twenty years. Concentration and vertical integration have been on the rise, especially in the retail sector. For farmers and food producers reaching end consumers is vitally important and as a rule, owning a proprietary distribution network is not possible nor economically reasonable. For them the network of stores owned by retailer industry is an important channel,[1] without which the producers cannot operate on the market, at least not effectively. Although generally not considered an essential facility, some legal scholars view a retail store as a **platform** through which two groups – producers and consumers – interact. Also, the retail is by some considered a **bottleneck of competition** (Berasategi, 2014), first because a retailer to a large extent controls which products are offered to the customers and which are not. And second, because of intra-store competition (Berasategi, 2014, p. 138) where retail determines how products are located on the shelves. Through procurement and purchase decisions as well as the placement of products on shelves the retailer holds the so-called **entrance ticket** for the producer to enter the marketplace, on the other hand the retailer also controls access the consumers have to the products of food industry.

At the same time, retail chains no longer merely act as an intermediary between the manufacturer and the end consumer. With their private label

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1 If not even an essential facility, if relevant conditions are fulfilled.

products[2] on the rise (as reported by George, 2011), they participate themselves in retail sales market and compete with the food industry for the final consumers. This complicates the relationship with the food industry even further. The retailer controls entirely the price for which the food industry products are sold to the end-consumers. Competition law prohibits any direct or indirect determination of prices or other trading conditions for third parties. Consequently, the retailer who at the same time also competes on the market with its private label product, is tempted to act unfairly. The retailer knows well what price the end-consumer is ready to pay for a certain product and knowing that determines the price of its private label on that level whereas the competing products are just a bit above it, creating an artificial price competition situation. Consumers deciding based on price will go for the retailer's private label product. Some scholars doubt already for some years now if it is justified to consider resale price maintenance an anti-competitive business practice and if the EU rule prohibiting producers from determining fixed or minimum sale price serves its purpose. In situations where the retailer is determining its private label product prices just a little bit above or below of prices of competing products, the retailer's logic and aim is clearly not economic efficiency, but rather to take some of the consumers away from a competing producer based on a price advantage. Also, to attract consumers to the store, the retailer may decide to sell some products at a low-price level, usually covering the corresponding losses at the expense of other products,[3] which can create a misconception about the value of the product and the actual price on the market. In the long term it will also undermine consumer price expectations and the value and reputation of competing brands.

In situations where the retailer competes with the food industry, it may be tempted to use the confidential information received in the procurement process for producing its own private label products. Also, often the retailer does not need to toil or bear the costs of introducing a new or modified product to the consumer. The retailer simply enters the market, using the

[2] A private label product is produced by a contract or third-party manufacturer and sold under retailer's brand name, whereas the retailer controls how the products is made, packaged, labelled etc. Retailers at certain size wish to rationalise their product assortment, which means keeping number 1 brand but eliminating brands on the positions 2 and 3 by replacing them with retailer own private label product.

[3] Statement by the Ministry of the Environment on the Green Paper on unfair trading practices in the European food chain and other goods supply chain, clause 6. Available at: https://ec.europa.eu/growth/content/consultation-green-paper-unfair-trading-practices-business-business-food-and-non-food-supply_en (last visited on 6.03.2019).

reputation created by other producers as well as the value created by the product (Dobson and Zhou, 2014). In doing so, the retailer acts as a **free rider** (Niels, Jenkins and Kavanagh, 2011, p. 315; Geradin, Layne-Farrar and Petit, 2012, p. 467), which is not in itself prohibited, but may also reduce the manufacturer's interest in product development. In such situations the business relationship between the manufacturer and the retail company depends largely on the bargaining power of one or the other party.

1. Food supply chain in Estonia

Estonian food production industry is one of the most important branches of the Estonian economy. The sector consists of approximately 500 enterprises[4] (Naaris, 2018). The sector employs over 15,000 people[5], which is about 2% of all labour market participants. In 2017 the sector production was worth a total of EUR 1.5 billion, of which 33% was exported. Food production industry represents in total ca 15% of the total production of the Estonian manufacturing industry. The biggest sub-sectors are dairy (21%) followed by meat production (20%) and the beverage industry (13%). Food producing industry is composed of large, medium and small sized companies, with more than half (62%) being micro-companies with less than 10 employees.

The Estonian retail market is considered moderately concentrated (with a HH index of 2,400)[6] and it is dominated by five retail chains: Coop Grupp, Maxima, Selver, Rimi and Prisma, with market shares ranging between 8 and 21% (see Table 1). In 2016, Coop Grupp had 351 sales units and revenues of EUR 508.2 million.[7] Maxima Eesti operated 75 sales units with an annual turnover of EUR 445.2 million.[8] Selver acted in 47 stores

4 As reference the total number of companies in 2016 was ca 120,000. Source: Statistics Estonia, available at: https://www.stat.ee/68771 (last visited on 6.03.2019).

5 As of 1 January 2018 the population in Estonia was 1,319,133, the number of participants in the labour market is roughly 700,000.

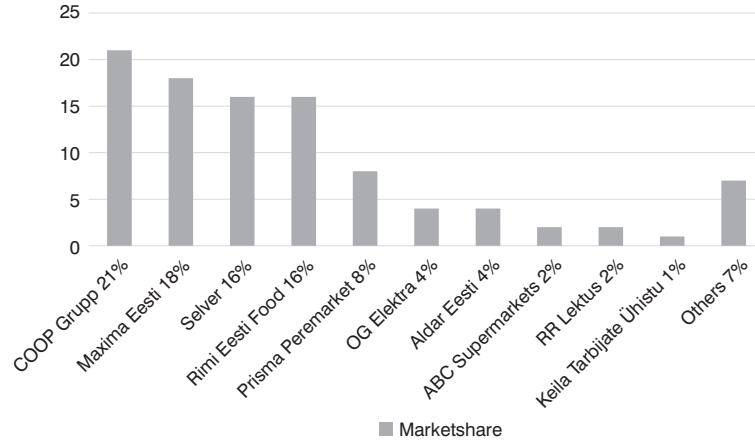
6 The Herfindahl-Hirschmann index calculated based on the data for the year 2012. HH index below 100 indicates a highly competitive market and the HH index below 1,500 indicates a lack of concentration whereas the HH index between 1,500 and 2,500 indicates a moderate concentration and a HH index of more than 2,500 references high concentration in the market.

7 According to the annual report of the company. See also http://www.kaubandus.ee/uudised/2017/07/28/jaeketid-hoiavad-turuosa (last visited on 6.03.2019).

8 According to the annual report of the relevant company. See also http://www.kaubandus.ee/uudised/2017/07/28/jaeketid-hoiavad-turuosa (last visited on 6.03.2019).

and made an annual turnover of EUR 398.7 million.[9] Rimi Eesti Food's annual turnover from 88 stores amounted to EUR 389 million and Prisma Peremarket with its 8 supermarkets made around EUR 190 million.[10] The market shares based on sales of the biggest retailers divide as follows:

Table 1. Estonian Retail Market



In 2016 there were 16,696 farms[11] in Estonia and although half (52%) of them are micro households with less than 10 ha or no agricultural land, the sector in general is characterized by concentration of production into large farming companies and a large share of rented land (Valdmaa, 2018). The sector is reporting to engage around 10,000 persons and its annual net turnover amounts approximately to 650 million euros.

According to the study executed in 2015 (Eesti Konjuktuuriinstituudi, 2015), hereinafter referred to as EIER Study, 59% of all responding companies[12] reported being exposed to unfair trading practices in 2014, with nearly 50% of the small companies and 80% of the large ones. Nine companies were producing private label products for the retail sector and all nine had experienced unfair trading practices. 44% of companies who experienced

[9] According to the annual report of the relevant company. See also http://www.kaubandus.ee/uudised/2017/07/28/jaeketid-hoiavad-turuosa (last visited on 6.03.2019).

[10] According to the annual report of the relevant company. See also http://www.kaubandus.ee/uudised/2017/07/28/jaeketid-hoiavad-turuosa (last visited on 6.03.2019).

[11] A farm household is an entity with at least 1 ha of agricultural land or where agricultural products are mainly produced for sale.

[12] 27 companies.

unfair trading practices[13] said that exposure to such practices had increased over the past three years. The authors of the study drew a pattern that the companies most exposed to unfair trading practices have products of relatively short shelf life (milk and meat). Also, there seems to be more exposure to unfair trading practices for companies with a strong competition and where the production of different companies is more easily replaced by their domestic competitor. Interestingly, the study revealed that small businesses which operate in specific niches or produce a unique product which has its own demand on the market were less exposed to unfair trading practices. Thus, it was concluded that retailers can use their market power for those products and manufacturers where it is possible to exchange one product for another company's product without significantly damaging consumer satisfaction. However, since in recent years demand has also begun to arise for natural or organic production of small producers, with regard to these, a retailer is ready to take more into account the interests of the producer and make compromises in order to offer these products in their stores (Eesti Konjuktuuriinstituudi, 2015, p. 19).

According to the EIER Study, the effects of unfair trading practices were most likely to have negative effects on profits[14] and costs[15]. A negative impact on product development was reported by 19% of businesses that were exposed to unfair trading practices. Out of these, nearly 80% stated that the cost of unfair practices had reduced their ability to invest into product development, and the investments made in new products have not paid off. More than 20% of the respondents reported that the retailer introduced its own private label on the market, using confidential information the food producer had supplied in the course of the procurement process. It was pointed out that unfair trading practices have distortive effects on the actual market share of producers, also they have resulted in unpaid working capital for the producer and sometimes retailers have made producing private label products for their purposes a prerequisite for placing producers' products on the shelves. Businesses were also asked to estimate how much of their sales revenue they lost because of sanctions applied by retailers and nearly half reported the sum to be around 5%.

To the question if the businesses have tried to resist the unfair practices by the retailers, and if so how, majority responded that they have tried to negotiate with the retailer. Nearly 70% of the respondents stated that they

13 12 companies.

14 As reported by 78% of companies exposed to unfair trading practices.

15 As reported by 70% of companies exposed to unfair trading practices.

were afraid of reprisals by the retailers and that they did not believe that the current legislation or existing public institutions (eg the Competition Board) could solve the problem effectively.

Companies were also given the opportunity to propose what measures they believed would help reduce the occurrence of unfair trading practices, and 84% of those who had experienced unfair trading practices emphasized the need to establish guidelines on good commercial practices, regulating the issues of fees (entrance fee, shelf fee, logistics fee, marketing fee etc), payment deadlines (should not exceed 30 days, and products with shorter shelf life should have a shorter payment deadline), termination notices and withdrawal from the assortment of goods. It was also proposed that the contractual relations between retailers and producers should be regulated by law in order to ensure equal treatment. As an example, it was suggested that there could be a chain-wide standard contract reviewed and approved by the Competition Authority. Nearly half of the study respondents considered that the Competition Authority should be given the right to inspect contracts between industry and retail trade enterprises.

2. Map of laws

Estonian law does not regulate unfair trading practices in B2B arrangements, excessive bargaining power nor a use or abuse thereof. Use of unfair trading conditions set out in Estonian Consumer Protection Act[16] applies only to B2C (business-to-consumer) relationships. There is a general regulation regarding the abuse of dominant position set forth in the Estonian Competition Act,[17] which prescribes a dominant position as position that enables a company to operate in the market to an appreciable extent independently of competitors, suppliers and buyers.[18] Dominant position is presumed if an undertaking accounts for at least 40% of the turnover in the market or several undertakings operating in the same market account for at least 40% of the turnover in the market.[19] Undertakings in control of essential facilities[20] are also considered undertakings in

16 Tarbijakaitseseadus, RT I, 31.12.2015, available here: https://www.riigiteataja.ee/en/eli/504012018004/consolide

17 Konkurentsiseadus, RT I 2001, 56, 332, available here: https://www.riigiteataja.ee/en/eli/527122017001/consolide (last visited on 6.03.2019).

18 Paragraph 13 section 1 of the Competition Act.

19 *Ibid.*

20 According to paragraph 15 of the Competition Act an undertaking is deemed to be in control of an essential facility or to have a natural monopoly if it owns, possesses or

a dominant position.[21] Considering, however, that most of the retailers currently operating in Estonia have less than a 20% market share, the abuse of dominant position rules set out in Competition Act are difficult if not impossible to apply. Additionally, the Competition Act prohibits in paragraphs 50 to 53 unfair competition. Pursuant to paragraph 50 section 1 of the Competition Act, unfair competition means *inter alia* dishonest trading practices and acts which are contrary to good customs and practices. There is, however, no known court case in which a court has handled excessive use of bargaining power under the rules of unfair competition. Thus, the ambiguity of these rules along with lacking case law makes it difficult to be used effectively in B2B unfair trading disputes. Unfair competition provisions as set forth in the Competition Act are entirely subject to private civil law as the legislator deliberately excluded such situations from the extra-judicial control by the Estonian Competition Board.[22]

In principle, the application of rules on standard terms and conditions set forth in the Law of Obligations Act[23] could be considered (Varul, Kull, Kõve and Käerdi, 2006). According to paragraph 32 of the Law of Obligations Act, a contract term which is drafted in advance for use in standard contracts or which the parties have not negotiated individually for some other reason, and which the party supplying the term uses with regard to the other party who is therefore not able to influence the content of the term, is deemed to be a standard term. A standard term is considered void if it causes unfair harm to the other party, considering the nature, contents and manner of entry into the contract as well as the interests of the parties. A term is unfair if it causes a significant imbalance in the parties' rights and obligations.[24] Paragraph 42 section 3 of the Law of Obligations Act lists a non-exhaustive list of standards terms that are considered unfair, but these apply to B2C situations. If a standard term specified in paragraph 42 section 3 is used in a B2B contract, the term is not automatically void, but it is presumed to be unfair,[25] a claim of which is rebuttable.

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operates a network, infrastructure or any other essential facility which other persons cannot duplicate or for whom it is economically inexpedient to duplicate but without access to which or the existence of which it is impossible to operate in the goods market.

21 Paragraph 13 section 2 of the Competition Act.

22 Tallinn Administrative Court, judgment of 27.02.2012, number 3-1-1-148, clause 15.

23 Võlaõigusseadus, RT I 2001, 81, 487, available here https://www.riigiteataja.ee/en/eli/508082018001/consolide (last visited on 6.03.2019).

24 Paragraph 42 section 1 of the Law of Obligations Act.

25 Paragraph 44 of the Law of Obligations Act.

3. Evolution of legislation and significance in political discourse

Already in 2013 when responding to the European Commission's Green Paper on unfair trading practices[26] the Estonian government declared[27] that it is important to reduce the use of unfair trading practices, since food expenditure in Estonia amounted to 27% of total household expenditure, which is almost twice the average in other EU member states. Also, it was indicated by the government that according to Eurostat the price level of food in Estonia in 2011 was 86% of the EU average, while the individual consumption reached only 58% of the EU average, indicating a relatively low purchasing power of consumers. The government noted that about 80% of food sector companies have been exposed to unfair trading practices such as (i) non-disclosure of written agreements; (ii) failure to present contracts; (iii) subsequent unilateral amendment of contacts; (iv) introducing various fees and charges (such as shelf fee, campaign fee, logistics fee, marketing costs etc). At the same time the government expressed the view that when designing enforcement mechanisms for unfair trading practices, contractual disputes between individuals, including award of damages, cannot be resolved by an enforcement agency under public law but only by an independent and impartial tribunal or court. According to the government one must keep in mind the principle of private autonomy (Kull, 2000) and in case of a legal dispute between parties of equal legal standing, the state cannot start protecting one party and start to realize its rights.

To conclude, the problem with unfair trading practices exists in Estonia, and the government is aware of that and acknowledges it, however, no state or public initiatives, originating either from the government or other public institutions, to tackle or regulate the unfair trading practices have resulted from that. Private sector, however, has been rather active on the matter, especially the associations uniting producers, which have had numerous meetings with the representatives of retailers, government agencies, parliament committees and so on. So far, however, the opinions on how to tackle the problem differ fundamentally. The farmers and producers would like to have a special law enacted, similarly to EU member states that have

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26 Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe (COM/2013/037 final).

27 Statement by the Ministry of the Environment on the Green Paper on unfair trading practices in the European food chain and other goods supply chain, clause 6. Available at: https://ec.europa.eu/growth/content/consultation-green-paper-unfair-trading-practices-business-business-food-and-non-food-supply_en (last visited on 6.03.2019).

considered it necessary to regulate unfair trading practices by specific laws or regulations (such as Latvia, Lithuania, Czech Republic, Italy, Hungary, Slovakia, Great Britain). Retailers, on the other hand, consider that a private regulation in form of guidelines on good commercial practice be enough to tackle the problem. In fact, the Estonian Traders Association[28] (hereinafter referred to as ETA) has established and enforced good commercial practices guidelines already in 1998 and amended them in 2008.[29] The problem seems, however, the non-binding nature of these. Out of nearly 60 ETA members less than 10 have signed the 1998 version of the good commercial practices. As of 2015 ETA started to work on a new set of rules, specifically for food sector, involving major food industry participants and on 31.08.2018 ETA guidelines on good trading practices in Estonian vertical food supply chain (ETA guidelines on food supply chain)[30] entered into force. According to the ETA webpage, its guidelines on the food supply chain can be joined by any undertaking by submitting a signed application either to ETA, Estonian Chamber of Commerce and Industry, Estonian Food Industry Association, Estonian Chamber of Agriculture and Commerce. So far 41 companies have signed the rules, among them 4 retailers: Maxima Eesti, Rimi, Selver and Prisma. Rest of the signing parties are producers and farmers.

In 2017 on the initiative of the Estonian Chamber of Agriculture and Commerce, a draft law on unfair trading practices in food supply chain (UTP Draft Law) was prepared and presented to the Parliament rural affairs committee. Even though the latter gave the draft a thorough review, it was not proposed to the parliament as an official law bill, with the argument that parliament should wait for the outcome of the discussions on the EU-wide directive on the issue. Therefore, most probably Estonia will not introduce any legal bill until the EU directive on unfair trading practices in business-to-business relationships in the food supply chain[31] is passed and enters into force.

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28 Kaupmeeste liit, http://kaupmeesteliit.ee/ (last visited on 6.03.2019).

29 http://kaupmeesteliit.ee/juhendid-ja-seadused/juhendid/ (last visited on 6.03.2019).

30 *Ibid.*

31 The European Commission proposal to the draft directive is available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52018PC0173 (last visited on 6.03.2019).

II. National legislation of Estonia on bargaining power

1. Publicly enforced law

As already stated above, in Estonian law, the definition of unfair trading practices relates to B2C (business-to-consumer) commercial practices and it originates from the directive 2005/29/EC.[32] Although member states were free to extend the application of the directive 2005/29/EC to B2B,[33] Estonia chose not to do that. Estonian Consumer Protection Act establishes protection for consumers who enter into contracts with traders who are professionally engaged in their economic and professional activities. The law applies to commercial practices that are directly related to the promotion, sale or supply of the product to consumers. If an undertaking purchases a product from a consumer, the Consumer Protection Act is not applicable.[34] Commercial practice means 'according to law any act, omission, course of conduct or manner of presentation, commercial communication, including advertising, and marketing, by a trader, directly related to the advertising, offering, sale or supply of goods or services to consumers or the purchase of things from consumers'.[35] A commercial practice is unfair 'if it is contrary to the requirements for diligence to be applied by a trader in the business or professional activities thereof, and it materially distorts or is likely to materially distort the economic behaviour with regard to the goods or services of the average consumer who comes into contact with the goods or

32 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

33 As put forward in the preamble point G of the European Parliament resolution of 4 February 2014 on the implementation of the Unfair Commercial Practices Directive 2005/29/EC. For example, Austria applied the directive to both B2C and B2B relationships and aggressive and misleading commercial practices, which are prohibited by the relevant rules, apply both to business-to-business and business-to-consumer relationships. Also, as provided in the European Commission study from 22.12.2011 on the application of Directive 2005/29/EC on unfair commercial practices in the EU, in Austria legal remedies can be used in civil courts, it is possible to bring actions against competitors, companies for damages and injunctions.

34 Explanatory note of the Consumer Protection Act, p. 9.

35 Paragraph 13 section 1 of the Consumer Protection Act.

services or to whom they are addressed'.[36] Commercial practices are unfair if they mislead consumers or are aggressive with respect to consumers.[37]

A commercial practice is deemed misleading if it contains false information or if presentation of factually correct information deceives or is likely to deceive the average consumer and in both cases as a result of it the average consumer makes or is likely to make a transactional decision that the consumer would not have made otherwise. Information is deemed to be false if it is untruthful in*:* '(i) the existence or nature of goods or services; (ii) the main characteristics of goods or services; (iii) the extent of the trader's commitments, the motive for using the commercial practice and the nature of the sales process as well as any statement or symbol associated with direct or indirect sponsorship or approval of the trader, goods or services; (iv) the price or the bases for calculation of the price, or the existence of a specific price advantage; (v) the need for maintenance, spare parts, replacement or repair; (vi) the features and rights describing the person acting as a trader or a representative thereof, including the trader's name and legal form, the assets, qualifications, status, approval, affiliation or connection thereof and ownership of industrial, commercial or intellectual property rights or received awards and distinctions; (vii) the consumer's rights, including the right to require replacement or reimbursement under the Law of Obligations Act'.[38]

A commercial practice is aggressive if 'by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to goods or services and thereby causes or is likely to cause the consumer to make a transactional decision that the consumer would not have made otherwise'[39]. Undue influence means 'exploiting the trader's position of power to apply pressure to the consumer in a way which significantly limits the consumer's ability to make an informed choice. Pressure can be applied to the consumer even without using or threatening to use physical force'[40]. In determining whether a commercial practice is aggressive, the following is considered: '(i) timing, location, nature or duration of the commercial practice; (ii) threatening or abusive behaviour or language of the same nature; (iii) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware,

36 Paragraph 15 section 1 of the Consumer Protection Act.
37 Paragraph 15 section 9 of the Consumer Protection Act.
38 Paragraph 16 sections 1 and 2 of the Consumer Protection Act.
39 Paragraph 18 section 1 of the Consumer Protection Act.
40 Paragraph 18 section 2 of the Consumer Protection Act.

to influence the consumer's decision with regard to goods or services; (iv) any onerous or disproportionate non-contractual barrier imposed by the trader if the consumer wishes to exercise the rights under the contract, including the right to withdraw from the contract or to switch to other goods or services or another trader'. By default are considered aggressive and thus prohibited: '(i) creating the impression that the consumer cannot leave the premises until a contract is formed; (ii) conducting a personal visit to the consumer's home ignoring the consumer's request to leave or not to return, except to perform a contractual obligation under the conditions and to the extent established by legislation; (iii) making persistent and unwanted solicitations by any means of communication, except to perform a contractual obligation under the conditions and to the extent established by legislation; (iv) requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising the consumer's contractual rights; (v) including in an advertisement a direct exhortation to children to buy, or persuade their parents or other adults to buy, advertised goods or services; (vi) demanding immediate or deferred payment for or the return or safekeeping of the goods supplied or services provided by the trader, but not solicited by the consumer; (vii) explicitly informing a consumer that if the consumer does not buy the goods or services, the trader's job or livelihood will be in jeopardy; (viii) creating a false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either there is no prize or other equivalent benefit, or receiving the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost'.

The use of unfair commercial practices is prohibited before, during and after making a commercial transaction related to goods or services. Offering and sale, as well as marketing of goods and services must follow good trade practice and be honest, whereas the offering of goods or services shall be planned and carried out in a manner whereby the commercial purpose of the offer is clear to consumers.[41] It must be noted, however, that rules set forth on unfair trading practices do not affect the application of legislation regulating private law, and violation of the prohibition on the use of unfair commercial practices does not result, in itself, in the nullity of the transaction.[42]

41 Paragraph 14 of the Consumer Protection Act.

42 Paragraph 13 section 2 of the Consumer Protection Act.

2. Privately enforced law

As can be seen by the wording and layout of the rules described above the Estonian unfair trading practices rules set put in Consumer Protection Act are oriented to B2C arrangement and cannot as a rule be used in B2B situations. There are some legal scholars in Estonia, who think that although rules on misleading trading practice cannot be applied to B2B situations the rules on aggressive trading practices could be extended also to B2B transactions, at least when SMEs are involved. Unfortunately, there is no legal practice that would back up this theory. If misleading practices take place in B2B situation the mislead undertaking can seek for annulment of the transaction under General Part of the Civil Code Act[43] (Varul, Kull, Kõve and Käerdi, 2010).

In case of threat or violence relevant rules set forth in the General Part of the Civil Code Act[44] should be applied. According to these rules a 'person who entered into a transaction under the influence of an unlawful threat or violence may cancel the transaction if the threat or violence was under the circumstances so imminent and serious as to leave the person who entered into the transaction no reasonable alternative'.[45] Threat is unlawful if the act or omission, used for threatening to induce the person to enter into the transaction, is unlawful. At the same time the means and the purpose of threatening can be lawful, just the way these are used for, is considered unlawful. For example, in the food supply chain, it is a widespread practice that retailers apply to suppliers unfairly long payment terms or commit the suppliers to accept economically unreasonable financial obligations (shelf fee, marketing, logistics etc). In the light of the freedom of contract principle, it would be legitimate, to impose an economically unreasonable and unjustifiable obligation on the supplier (the purpose of the threat) and refuse to enter into a contract (a means of threat) if these are not followed, however such acts of the retailer with bargaining power over the supplier would be questionable under the principles of good morals and good faith. Unfortunately, as all this is a theory only, as Estonia lacks any relevant court practice.

Additionally, even though not with the power to change law, custom which arises from long-term usage of a type of conduct can be the source of

43 Tsiviilseadustiku üldosa seadus, RT I 2002, 35, 216, available at: https://www.riigiteataja.ee/en/eli/509012018002/consolide (last visited on 6.03.2019).

44 Tsiviilseadustiku üldosa seadus, RT I 2002, 35, 216, available at: https://www.riigiteataja.ee/en/eli/509012018002/consolide (last visited on 6.03.2019).

45 Paragraph 96 of the General Part of the Civil Code Act.

civil law, if the persons involved in commerce consider it legally binding.[46] Thus, the question is, if ETA guidelines on food supply chain that I referred to above can be considered as custom and does it bind all trading companies operating in Estonia (Kull, 2010). They would if they could be indeed being considered custom. Having in mind that there are more than 100,000 enterprises in Estonia, ETA guidelines on food supply chain can hardly been considered a custom, binding on all traders. Thus they most probably are binding on traders who have signed them or agree otherwise to be bound by them, however it is questionable, if they bind the rest of the traders.

In the current situation, with no specific laws regulating the matter or sufficient court practice, we cannot draw any conclusions on if the relevant valid laws and rules are effective in protecting the interest of undertaking engaged in food supply change. Besides it is very likely that companies exposed to unfair trading practices avoid turning to court because of fear factor, as they are afraid of losing the business entirely and to continue the food supply, they accept unfair conditions.[47]

III. Nature of infringement and scope of public enforcement

1. Economic agents covered by the law (*ratione personae*) and nature of prohibited practices

As indicated above no special law regulating bargaining power exist in Estonia, nether public nor private. The closest rules currently are the ETA guidelines on food supply chain applicable to signing parties. For the sake of clarity, we also provide an overview of UTB Draft Law.

ETA guidelines on food supply chain is silent on the agents covered. In general, any trader is free to sign the rules and consider itself bound by them. The question, however, remains on the consequences with regard to violating the rules by signing party as they do not foresee any sanctions. Also, it is not clear if a producer or farmer needs to be a signing party itself to be able to impose ETA rules.

UTP Draft Law was intended to restrict unfair trading conditions in food supply chain,[48] whereas the law would apply to any company engaged in food supply chain.[49] For the purposes of UTP Draft Law a food business

46 Paragraph 2 of the General Part of the Civil Code Act.
47 *Ibid.*, 19.
48 Paragraph 1 clause 1 of UTP Draft Law.
49 Paragraph 1 clause 2 of UTP Draft Law.

undertaking[50] had significant market power if its purchasing power in the relevant product market enables it to operate to a significant extent independently of suppliers, buyers and competitors. Significant market power was assumed for a retail company that has (i) at least 5 sales outlets with sales space of 1000 m^2 and (ii) whose sales revenue in the previous financial year was at least EUR 50 million.[51]

2. Nature of prohibited practices in ETA guidelines on food supply chain and UTP Draft Law

ETA guidelines on food supply chain do not define bargaining power neither do they provide conditions for the application of the rules. In the first part it merely lists 12 so-called good custom principles:

1) **considering consumers interest** – contracting parties must consider the interests of consumers and the overall sustainability of the supply chain for B2B relations;
2) **freedom of contract** – parties are independent economic entities that respect each other's right to develop their own strategies and management policies, including the freedom to enter into contracts;
3) **fair transaction** – contracting parties shall act in a responsible manner in good faith and in accordance with the requirements of professional diligence;
4) **written contracts** – contracts must be made in writing or in a format which can be reproduced in writing. Contracts must be clear and transparent and include as many relevant and foreseeable elements as possible, including the rights and procedures for termination;
5) **prevention** – contract terms and conditions cannot be unilaterally changed;
6) **conformity** – contracts must be fulfilled;
7) **information exchange** – when exchanging information, competition law and other applicable legislation must be strictly observed. Information must be accurate, not misleading and provided in timely manner;
8) **confidentiality** – principle of confidentiality of information must be respected;
9) **liability** – every participant of the supply chain is responsible for its own risks;

[50] As defined in Article 3 point 2 of Regulation (EC) No 178/2002 of the European Parliament.

[51] Paragraph 2 sub-clause 4 of UTP Draft Law.

10) **requirements** – contracting party may not express threats to obtain undue advantages;
11) **equality** – contracting parties are equal partners;
12) **reasonableness** – parties must follow the principle of reasonableness.

In the second part of ETA rules topics are listed along with examples on what is considered as a fair and unfair trading practice. For example, with regard to **pre-contract negotiations**[52] it is considered unfair if negotiations or entering into contract is delayed unreasonably or without any reason. The guideline does not define what should be considered unreasonable. According to paragraph 7 of the Law of Obligations Act reasonableness is to be judged by what persons acting in good faith would ordinarily consider to be reasonable in the same situation, considering *inter alia* the nature of the obligation, the purpose of the transaction, the usages and practices.

With regard to **entering into contract**[53] the guidelines define as unfair practices where the contract parties rights and obligations are not in balance, or if essential terms and conditions are not set forth in writing or are not fulfilled. Also, providing dishonest standard terms and conditions is considered unfair.

According to the guidelines, **changing the contract**[54] is unfair if changes are made unilaterally and retroactively by one party, such as appointing extra costs or charges. **Termination of the contract**[55] is considered unfair if done at short notice or without any notice or good reason.

Applying **contractual sanctions**[56] is unfair if applied without reason or if the sanctions are not proportionate to the damages caused. Also, delaying the payment of sanctions or challenging them without good reason is considered unfair practice.

A special part is devoted to the topic of **pressurizing**[57] cases, on which the guideline provides that endangering with business distress or ending the business in order to gain an advantage without objective justification, for example by penalizing one party for exercising their rights, is unfair business practice. Also, obliging one party to purchase or deliver products or services related to the products or services by either the other party of the contract or third party is unfair. Unfair is also to threat to exclude products

52 Clause 2.1 of ETA guidelines on food supply chain.
53 Clause 2.2 of ETA guidelines on food supply chain.
54 Clause 2.3 of ETA guidelines on food supply chain.
55 Clause 2.4 of ETA guidelines on food supply chain.
56 Clause 2.5 of ETA guidelines on food supply chain.
57 Clause 2.6 of ETA guidelines on food supply chain.

from the list or not to deliver the products, or to impose unfavourable contractual terms. As well the pressure though a third party, for example requiring price change at a competitor before assortment decision can be made.

ETA rules consider unfair any activity related to hiding information that is essential for the other party with regard to entering into or fulfilling the contract. Also, providing false information or not informing the other party on inadequate stock is unfair. Disclosing sensitive information to a third party, if done for competitive advantage, is reprehensible.[58]

Unfair **transfer of business risk**[59] is according to the ETA guidelines:

- to transfer unreasonable or disproportionate risk to the other party, for example imposing a guarantee for failing to achieve results;
- to requests fees for services not provided and/or ordered (eg requiring marketing fee without prior agreement) or for goods not supplied or charging a fee that does not meet the value or price of the service provided (eg demanding unreasonably high supply costs);
- to request from the other contract party to finance your business (eg if the retailer requires compensation for erecting or renovating store premises);
- to claim marketing costs, unless explicitly agreed by the parties in advance;
- to claim shelf fee that is disproportionate to the risks posed by having the new product on sale;
- to obstruction the contracting party's in marketing and advertising its products;
- to return unsold goods in an unreasonable amount, unless they are new or unknown to the consumer, or the initiative for the supply was from the supplier;
- to change product specifications and assortment less than 10 days before delivery.

With regard to **campaigning**,[60] the guidelines consider unfair if a party refrains from agreeing on the terms of the campaign, including the return of goods, compliance of packages etc. Also, disclosing information to the other party based on which this party may make an incorrect sales forecast

58 Clause 2.7 of ETA guidelines on food supply chain.
59 Clause 2.8 of ETA guidelines on food supply chain.
60 Clause 2.9 of ETA guidelines on food supply chain.

is unfair, as well as not considering a forecast of the campaign in the production process, as a result of which agreed volumes cannot be supplied.

An important part of the guidelines is the delivery, receipt and return of goods.[61] It is declared unfair:

- to deliberately disregard for undue advantage order, delivery or receipt schedule;
- to demand fees for supply costs, which do not correspond to the price or value of the provided delivery service;
- to refuse to agree on the standards for pallets and the percentage of lost goods;
- to assess suitability of pallets retrospectively after these can no longer be associated with the supplier;
- to return pallets that do not comply with the standard to the supplier, unless otherwise agreed in the contract;
- to deliver goods on pallets which do not comply with agreed quality standards;
- to deliver products with different purchase prices or quantities; not to deliver ordered products or deliver products that are not ordered;
- to deliver products with shorter disposal time than agreed or to deliver outdated products;
- to deliver products that do not comply with agreed quality standards or specifications;
- to deliver products outside agreed delivery times;
- to fail collecting returned products or to delay with collecting thereof;
- to practice frequent recall of products, which results in additional work and an empty shelf;
- by the retailers to repair pallets and putting them into resale.

As to **payment terms**,[62] the guidelines consider unfair if they are unreasonable and do not take into account the shelf-life of the products.

In general, the guidelines try to deal with the problem of unfair trading practices, however as can be seen above, the wordings are rather ambiguous, and the interpretation depends largely on the custom as well as what has been actually been agreed between the parties. It does little to tackle the main issue of bargaining power, where the contracting parties simply lack equality.

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61 Clause 2.10 of ETA guidelines on food supply chain.

62 Clause 2.11 of ETA guidelines on food supply chain.

UTP Draft Law on the other hand prohibits any activity of the food business undertaking with significant market power which consists of imposing directly or indirectly unfair trading conditions[63]. Paragraph 3 clause 2 of UTP Draft Law provides a non-exhaustive catalogue prohibited activities:

‘1) a direct or indirect obligation to pay a fee for the right to sell food at a retail outlet (“entry fee”);
2) a direct or indirect obligation to pay for the presentation of a food product at the point of sale (so-called shelf fee), unless the retailer and supplier have agreed in writing and the amount of the remuneration is based on the costs directly incurred;
3) a direct or indirect obligation to pay remuneration to a retail company in connection with the advertisement of a food product or to compensate a retail firm for the cost of advertising the food, except where there is a written agreement between the retail undertaking and the supplier which clearly sets out the amount of remuneration or the amount of reimbursable expenses and the advertising measures applicable;
4) a direct or indirect obligation to compensate the retail company for the cost of supplying the food retail company from the warehouse to the place of sale;
5) a direct or indirect obligation to pay compensation to a retail company or to compensate for loss of income if the actual sales revenue of a food proves to be less than the sales revenue planned by the retail company;
6) a direct or indirect obligation to buy food from the retail company at the point of sale, except for non-packaged food, if it is safe, the products are of high quality and the term “best before” is still 1/3 of the time;
7) a direct or indirect obligation to compensate any retail company involved in the renovation of retail outlets or newly built retail outlets, as well as the obligation to compensate the retail company for any other non-delivery costs;
8) the change of the food supply, assortment strength and labelling of the food business without prior notification to the food supplier under the terms of this written agreement, the time of notification being not less than 60 days;
9) the retail company’s right to unilaterally or retroactively change the terms of the written agreement with the food supplier, for example, the

[63] Paragraph 3 clause 1 of UTP Draft Law.

retail company's right to deduct discounts applied to sales by consumers from the amount payable to the supplier;
10) the obligation to reimburse the costs of handling consumer complaints, unless the consumer rightly lodges a complaint with regard to matters for which the food supplier is responsible. In this case, the retail company may require the supplier to reimburse the direct costs involved in the processing;
11) an obligation to pay unjustly large contractual penalties in the event of a breach of contract, unreasonably large amounts of damages or other compensation, except where they are proportional to the damage caused by the breach of obligation;
12) the right of a retailer not to return to the supplier the reusable packaging of wood, plastic, glass or other materials, unless otherwise agreed
13) an obligation to ensure that the price of food sold to a retailer is lower than the price at which the food is sold to other purchasers;
14) a direct or indirect obligation to purchase goods, services or other property specified by a food business undertaking;
15) an unfair and unreasonably long payment term. For a food with a shelf--life of up to 25 calendar days unfair and unreasonably long payment term is one that exceeds 30 days from the delivery. For fresh vegetables and berries supplied at least 3 times a week unfair and unreasonably long payment term is one that exceeds 20 calendar days from delivery'.

IV. Public enforcement institution and proceedings

Extra-judicial proceedings concerning the unfair commercial practices in B2C relations are conducted by the Estonian Consumer Protection Board. The misconduct procedure can result for the violator with a fine up to EUR 32,000.[64]

ETA guidelines on food supply chain provide for no sanctions or procedural rules. UTP Draft Law on the other hand foresees that a company violating the prohibition of unfair trading conditions in B2B relationship faces a misconduct procedure with a maximum fine of EUR 400,000.[65] Competent authority to perform supervision and misconduct procedure under the UTP Draft Law is the Competition Board, whereas the limitation period is three years. In addition to public enforcement, UTP

64 Paragraph 70 of Consumer Protection Act.
65 Paragraph 4 of UTP Draft Law.

Draft Law ruled that the proprietary or other damage caused by violating the prohibition of unfair trading practices must be compensated, subject to civil law procedure.

UTP Draft Law addressed also the situation where at the same time with unfair trading practices dominant position is abused, stating that in such a case company should be liable under the Competition Act.

For the Competition Board, the UTP Draft Law provided extension of competences[66] including taking measures to restrict unfair trading conditions.[67] Also, proceedings can be initiated not only based on a notification of a party, but also on the Competition Board's own initiative if they suspect a violation.[68] The Competition Board was also equipped with analysing functions and reporting obligations.[69]

Even though the UTP Draft Law has not been a success in sense that the draft law was not presented to Estonian parliament for discussion and adoption, it was a great help in starting a discussion between the stakeholders and renewing and updating the Estonian Traders Association good commercial practices guidelines. It is expected that as soon as the EU directive on unfair trading practices in B2B relationships is adopted and enforced the Estonian law will be harmonised with these rules. It is not known, however, if the Estonian legislators satisfy with the minimum list of prohibitions set forth in the relevant directive or adopt also further prohibitions peculiar to Estonian market situation.

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66 Paragraph 7 clause 1 of UTP Draft Law.
67 Paragraph 7 clause 2 of UTP Draft Law.
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Mónika Papp*

HUNGARY

I. Introduction

1. Food supply chain in Hungary

Food retail is concentrated in Hungary, with more than 90% of the market in the hands of 10 retail chains. In the retail business, more than 27% of the products sold is food (Kopcsay, 2014). The level of concentration is moderate in terms of HHI, although it is increasing.[1]

On the other hand, agricultural production is very fragmented. In the farming industry, 91% of the enterprises are micro-and small enterprises, 7% are medium-sized and only the rest is large undertakings (Országgyűlés, 2015).

Food production is moderately concentrated, with 90% of companies involved being micro or small enterprises. Notwithstanding this, the remaining 10% (medium and large undertakings) has a considerable influence on the functioning of the market. Around 40% of the Hungarian food industry's output is exported, the rest is sold in Hungary (Agrárgazdasági Kutató Intézet, 2016).

* Reseach Fellow, Hungarian Academy of Sciences, Centre for Social Sciences and Senior Lecturer ELTE Eötvös Loránd University, Budapest, Hungary, Faculty of Law; ORCID 0000-0003-1010-7939; mpapp@ajk.elte.hu. I thank Tihamér Tóth for providing useful comments on the previous version of this paper. All omissions and errors are mine.

1 Decision of the Hungarian Competition Authority No. Vj/047-274/2010, Case *Spar* (2012). In 2010 the HHI was 1132.

2. Map of laws

In October 2009, **Act XCV of 2009 on the Prohibition of Unfair Trading Practices Applied Against Suppliers Relative to the Marketing of Agricultural and Food Products** (UTP) was enacted by the Parliament and entered into force on 1 January 2010. The UTP regulates unfair trading practices in the food supply chain and is applied by a special Hungarian administrative body, called NÉBIH (National Food Chain Safety Office) established in 2012, which is supervised by the Ministry of Agriculture. The UTP is *lex specialis* with regard to the regulation of undertakings having a significant market power, and with regard to the regulation of undertakings having a dominant position. The former is dealt with under the **Trade Act** (Act CLXIV of 2005 on Trade) and the Hungarian Competition Authority is responsible for the enforcement. The Trade Act has a wider, non-sectoral scope and prohibits undertakings having a significant market power to abuse it vis-á-vis their suppliers. Significant market power is defined by the Act.[2] Article 7(6) of the Trade Act excludes from its scope all cases which fall under the UTP.

Although the UTP is based on public enforcement by a public administrative body, it declares null and void any contract term that has been incorporated into the contract containing unfair trading practices, or aiming to circumvent the prohibition set out in the UTP.

The **Competition Act** (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices) is also *lex generalis* vis-á-vis the UTP. The most important provisions of the Competition Act are Article 11 on

[2] Article 2 (7): Significant market power means a market situation, as a result of which the trader becomes or has become a reasonably indispensable contractual partner for the supplier in the course of delivering products and services to buyers and, due to its share in trade, it is able to influence the market entry of a product or product group at national or regional scale. Article 7 (3): Significant market power against the supplier exists if the consolidated net income of the given corporate group, including the parent companies and subsidiaries as specified in Act C of 2000 on accounting and, in the case of joint purchase, the companies constituting the purchasing association, from commercial activities in the previous year (hereinafter "consolidated net income") exceed 100 billion forints. [approximately 300 million EUR] Article 7 (4): In addition to paragraph (3), the significant market power of the trader also exists if, based on the structure of the market, the existence of barriers to market entry, the market share of the undertaking, its financial power and other resources, the extent of its commercial network, the size and location of its stores, the aggregate of its commercial and other activities, the trader undertaking, corporate group or purchasing association is or will be in a unilaterally favourable negotiating position vis-á-vis the supplier.

the prohibition of restrictive agreements[3] and Article 21 of the prohibition of abuse of a dominant position. One amendment of the Trade Act from 2014 defined the notion of dominant position under the Competition Act based on turnover. Before this modification, turnover was not used to define a dominant position.[4] The dominant position over the turnover threshold is presumed and cannot be rebutted. Given that the biggest retail companies' turnover usually exceeds this turnover threshold, they come under the scope of the Competition Act and potentially the prohibition of abusing their dominant position can be applied to their practices (Article 21 of the Competition Act). The Competition Act is enforced by the Hungarian Competition Authority. Proceedings (also based on Article 21) under the Competition Act take precedent over the application of the UTP.[5]

The **Hungarian Civil Code** (Act V of 2013 on the Civil Code) is applicable to disputes of late payment by retail companies, generally to the breach of contractual obligations or the application of unfair terms in contracts.[6] One

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3 Under Article 93/A of the Competition Act certain agricultural cartels are subject to a special procedure and are not prohibited.

4 Article 7/A Trade Act: Article 7/A(1): In accordance with Act LVII of 1996 on the prohibition of unfair and restrictive market practices, dominant position exists in the retail market for everyday consumer products, as the relevant market, if the consolidated net income of the undertaking, or of the affiliated undertakings jointly as specified in point 23 of Article 4 of the Act LXXXI of 1996 on corporate tax and dividend tax, exceeds 100 billion forints in the preceding year with respect to the retail sale of everyday consumer products.
(2) For the purpose of this article, everyday consumer product means the products defined in point 18a of Article 2, excluding toiletry, drugstore products, household detergents and chemical products, as well as sanitary paper products.[includes food]. To my knowledge the GVH has not yet opened proceedings based on this definition. This definition of dominant position is applicable since 1 January 2016. It potentially renders the undertakings with a big turnover subject to abuse of dominant position and specifically to pricing abuses.

5 Under Article 4 (1) UTP: Proceedings under this Act my not be opened, proceedings shall be terminated and any decision on applying the legal consequences provided in this Act shall be withdrawn if the trader in question has already been arraigned for the same conduct under Article 21 of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition on related infringements, and a decision establishing violation has been adopted or a commitment has been made. Proceedings conducted under this Act shall be suspended for the duration of proceedings opened for the same conduct under Article 21.

6 The most relevant provisions of the Civil Code are Book 6, Part One, Title III, Chapter IX on the performance of a pecuniary debt, Chapter X on set-off, Chapter XV on the conclusion of a contract under standard contract terms, Chapter XXII on breach of contract, Chapter XXIII on default, and specifically Article 6:98 on obvious disproportionality, 6:102 on, Article 6:106 on actions in the public interest.

of the most relevant provisions of the Civil Code is Section 6:102 ("Unfair

6:98: Obvious disproportionality: (1) If, upon the conclusion of the contract, there is an obvious disproportionality between the value of the service and the consideration, and there is no intention by one of the parties to grant benefits free of charge, the aggrieved party may contest the contract. A person who was able to recognise the obvious disproportionality or undertook the risk of obvious disproportionality, shall not contest the contract.
6:130: Time for performance of a pecuniary debt- implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, p. 1–10.
Article 6:106: [Action in the public interest in connection with contracts concluded between undertakings and contracts between a contracting authority and an undertaking not qualifying as a contracting authority]. From the 1 January 2018:
(1) Organisations engaged in the representation of the interests of undertakings may also contest, pursuant to the rules of the Code of Civil Procedure on actions brought in the public interest, as unfair a clause that becomes, as a standard contract term, a part of the contract between undertakings and sets forth unilaterally, unreasonably and to the detriment of the obligee the time for performance of a pecuniary debt or the rate and due date of the default interest by violating the principle of good faith and fair dealing.
(2) Also an organisation engaged in the representation of the interests of undertakings
a) may apply to the court for a decision establishing that a contract clause that becomes, as a standard contract term, a part of the contract between a contracting authority and an undertaking not qualifying as a contracting authority and sets forth the time for performance of a pecuniary debt longer than sixty days, is null and void with respect to the part in excess of sixty days; or
b) may, by contesting it as unfair term, apply to the court for a decision establishing that a clause that becomes, as a standard contract term, a part of the contract between a contracting authority and an undertaking not qualifying as a contracting authority and sets unilaterally and unreasonably a time limit not exceeding sixty days to the detriment of the undertaking not qualifying as a contracting authority, other than as set out in this Act for the contracting authority, in violation of the principle of good faith and fair dealing, is invalid.
(3) In the event of a well-founded request under paragraphs (1) and (2), the court shall establish the nullity or invalidity of the clause effective against all parties contracting with the entity applying it. The establishment of nullity or invalidity shall not affect the contracts that have already been performed.
(4) An organisation engaged in representing the interests of undertakings may request the establishment of the unfair nature and nullity of a standard contract term under paragraphs (1) and (2) set forth and made publicly available for the purpose of concluding contracts, even if the term concerned has not yet been applied. In the event of establishing the unfair nature of the standard contract term concerned, the court shall ban the publishing entity from applying it.
(5) In proceedings under paragraphs (1) to (2) and (4), the court shall order, at the request of the person enforcing the claim, that the entity that applies or offers the application of the contract term shall arrange, at its own cost, the publication of an announcement on the establishment of the unfair nature or the nullity of the contract term. The court shall decide on the text and manner of publishing the announcement. This announcement shall contain the precise identification of the contract term concerned,

standard contract term") which sets out that a standard contract term shall be unfair if it unilaterally and unreasonably, and by violating the principle of good faith and fair dealing, sets forth the rights and obligations arising from a contract to the detriment of the party contracting with the person applying that contract term.[7]

Under Article 6(5) UTP, ongoing NÉBIH proceedings do not exclude enforcement of supplier's rights based on civil law.

3. Modification of national provisions and the opinion of the Hungarian Government on the draft EU legislation

The UTP was adopted after the financial and economic crises in 2009 under the socialist-liberal coalition government. It was adopted in an accelerated, special procedure by the Parliament. The adopted Act was sent back to the Parliament for consideration by the President of Hungary, László Sólyom.[8] He raised that the Act had been adopted on a short notice without any prior impact assessment report, being inconsistent with the civil law (on the question of late payment, calculation of deadlines, on the question of

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the establishment of its unfair nature or nullity and the arguments on which its unfair nature is based.

(6) An organisation engaged in representing the interests of undertakings may request the establishment of the nullity of standard contract terms that

a) exclude in a contract between undertakings the obligation to pay default interest, or exclude or restrict the obligation to pay the costs related to the collection of claims;

b) set forth in a contract between a contracting authority and an undertaking not qualifying as a contracting authority the due date of the default interest at variance with the day following the payment time limit determined by this Act for the performance of a pecuniary debt, or exclude or restrict the obligation to pay default interest or the obligation to pay the costs related to the collection of claims.

7 Section 6:102, Civil Code:

(2) The unfair nature of a standard contract term shall be assessed by examining all circumstances existing at the time of concluding the contract and leading to its conclusion, and the designated purpose of the stipulated service, as well as the relationship of the term concerned with the other terms of the contract or with other contracts.

(3) The provisions on unfair standard contract terms shall not apply to contract terms defining the main service or the ratio between the service and the consideration, if those terms are clear and intelligible.

(4) A standard contract term set forth by law or established in accordance with the requirements set forth by law shall not qualify as unfair.

(5) The aggrieved party may contest the unfair contract term that became a part of the contract as a standard contract term.

8 http://www.parlament.hu/irom38/10057/10057-0006.pdf (last visited on 13 January 2019)

partial nullity of contracts, on the lack of precision of fining policy). After reconsideration, the Parliament re-adopted the Act with amendments.

After the FIDESZ-KDNP government came into power, it introduced several modifications and clarifications aimed at introducing stricter rules and more robust enforcement. For this reason, I refer in the footnotes to the temporal effects of the law.

The Act is considered as one of the most stringent among EU Member States (Di Marcantonio and Ciaian, 2017, p. 44–45). Hungary ranks fourth (after Croatia, France and the UK) among 28 Member States in terms of the stringency of their Unfair Trade Practice regulatory framework according to the study prepared for the European Commission (Di Marcantonio and Ciaian, 2017, p. 45).

Probably this is the reason why the current government considers that the draft EU directive is not tackling all the problems in the Hungarian market and has called for stricter norms to be adopted by European institutions. Together with the agricultural ministers of the Visegrad 4 countries and Bulgaria, Croatia, Slovenia, Romania the following joint declaration was issued:

> *'The farm ministers of the Visegrad Group – Hungary, the Czech Republic, Poland and Slovakia – together with their counterparts from Bulgaria, Croatia, Slovenia and Romania issued a joint declaration urging equal treatment for small as well as large agribusinesses in a draft directive of the European Commission at a meeting in Nitra, Slovakia, on Wednesday. The EC directive would prohibit buyers of farm products from making unilateral or retroactive changes to their contracts with suppliers, and from cancelling orders for perishables at the last minute*," the press office of Hungary's farm ministry said (Visegrad Group, 2018).

The Hungarian Ministry of Agriculture added that the draft directive provides for a limited protection for SMEs producing food products and protection against unfair practices should be extended independent of the size of undertakings (Ministry of Agriculture, 2018).

For the Hungarian Government probably the most important goal during the negotiations was to shield its stricter national rules from minimum EU harmonisation. For this purpose the text regulating the nature of minimum harmonisation was crucial. The proposal of the European Commission framed the nature of the minimum harmonisation as follows in Recital 10 of the draft directive:[9]

[9] Proposal for a directive of the European Parliament and Council on unfair trading practices in business-to-business relationships in the food supply chain, Brussels, 12.4.2018 COM(2018) 173 final 2018/0082 (COD).

'*As a majority of Member States already have national rules on unfair trading practices, albeit diverging, it is appropriate to use the tool of a Directive to introduce a minimum protection standard under Union law. This should enable Member States to integrate the relevant rules into their national legal order in such a way as to bring about a cohesive regime. Member States should not be precluded from adopting and applying on their territory stricter national laws* ***protecting small and medium-sized suppliers*** *and buyers against unfair trading practices occurring in business-to-business relationships in the food supply chain, subject to the limits of Union law applicable to the functioning of the internal market.*'

The European Parliament has proposed deleting the reference to the protection of only SMEs from recital 10 and referred instead to the protection of all suppliers.[10] This proposal better suits the interests of Member States to maintain their strict protection. Other proposals tabled by the responsible Committee of the European Parliament also point to the introduction of stricter norms and widening the 'black list' of the proposed prohibited practices.[11] It is to be seen how the political agreement between the Council, the European Commission and the European Parliament plays out in the terms of the draft directive.[12]

II. Detailed description of national legislation

The UTP's purpose is to ensure that fair trading business practices are exercised between companies engaged in trading agricultural and food products and their suppliers (Article 1). The Act prohibits unfair trading practices (Article 3). The Act imposes an obligation on traders to publish in advance the standard contract terms applied vis-á-vis their suppliers in a consolidated form, together with all the amendments on its website, or,

[10] Amendment 12 of the European Parliament: 'Member States should not be precluded from adopting and applying on their territory stricter national laws protecting all suppliers and buyers regardless of their size against unfair trading practices occurring in business-to-business relationships in the agricultural and food supply chain, subject to the limits of Union law applicable to the functioning of the internal market'; http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2018-0309&language=EN (last accessed on 13 January 2019).

[11] See Amendment 46-87 of the Committee on Agriculture and Rural Development of the European Parliament. On the Commission's proposal see Piszcz, 2018, pp. 143–167.

[12] The political agreement was reached on 19.12.2018. See: https://www.consilium.europa.eu/en/press/press-releases/2018/12/19/fairer-contractual-relations-in-the-agri-food-chain-agreed/ (last visited 13 January 2019).

if the trader does not have a website, at his premises. He is also obliged to send them to NÉBIH.

Standard contract terms shall contain the description of the trader's services, the conditions for supplying such services, the highest fee chargeable for such services, the method used for calculating such a fee, as well as the conditions for admission to, and removal from, the trader's list of suppliers.

The obligation of establishing and publishing the standard contract terms shall not apply to a trader whose net turnover from the previous year does not exceed 20 billion forints (EUR 60 million).

Currently 33 traders have published their standard contract terms on their websites and on the website of NÉBIH.

Under the Act, a supplier shall not validly consent to expose itself to unfair trading practices.

1. Privately enforced law

Since 2010, the date when the UTP entered into force, public enforcement is dominating. No data on private enforcement was immediately available.

2. Publicly enforced law

The UTP is actively enforced by NÉBIH. According to data published by NÉBIH on its website, it adopted 30 decisions in 2016 and 20 decisions in 2017.[13] According to the UTP, information about decisions shall be deleted after two years from the NÉBIH website.

3. The relationship between public enforcement law and other acts

See above, at Section I.

4. Key enforcement decisions and case law

In the following points I have summarized the main provisions of the Act, which have entered legal practice.

Many court cases revolved around the definition of late payment. As the UTP rules were not in accordance with the general civil law (Civil Code) rules on late payment, courts and later the Supreme Court (*Kúria*) had to deal with this issue. Later, the provisions (see new Article 3 (2) h) were amended to reflect the case-law.[14] I do not go into the details of this inconsistency in Hungarian law.

Another point litigated was whether traders had an obligation to reimburse the suppliers after the time period expired for discounts and whether any remaining product could be sold under the discounted terms.[15]

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13 http://portal.nebih.gov.hu/documents/10182/21400/2016+%C3%A9v+d%C3%B6nt%C3%A9sek.pdf/24441b37-252b-4472-892d-736599577a18 and http://portal.nebih.gov.hu/-/tisztessegtelen-forgalmazoi-magatartas.

14 Kúria Kfv. 37587/2012/11.

15 Kúria Kfv. 37435/2012/6.

The *Kúria* answered this question relying on the preamble and goals of the Act (protection of suppliers) by ruling that it is unfair if goods bought under discounted terms are not passed on to the consumers because the trader will get an unfair benefit. There has been considerable controversy around the question of bonuses.

As the Act prohibits charging any fee for services actually not provided (Article 3 (2) ea), this term was interpreted by courts. The Supreme Court ruled that, although bonuses are an element of the price and the parties under general civil law have the right to determine the contract price, bonuses can be subject to judicial scrutiny under the UTP Act. The *Kúria* relied on the fact that under Article M) (2) of the Fundamental Law, Hungary shall ensure the conditions for fair economic competition and shall act against any abuse of a dominant position. If the trader sets a fixed bonus for the quantities sold, it assumes no risks for selling the products, hence the *fixed bonus* is prohibited. On the contrary, so-called progressive bonuses are allowed under the Act, as the trader undertakes to sell more products supplied by the supplier and undertakes the risks associated with buying and selling more products under the target quantities. The *Kúria* distinguished fixed and *progressive bonuses* not under the denomination of the trader's contract terms, but under their content, function and whether the trader undertakes risks for getting the bonus.[16]

Under Article 3 (3) ed) the trader shall not charge a fee (for services solicited by the supplier and supplied by the trader) at an excessive rate (prohibition of disproportionate rate). Fees charged for auditing services or marketing services should be proportionate and shall be published in the standard contract terms.[17]

If the trader submits its orders by electronic means, there is no additional service provided as it is the trader's duty to send its order to the supplier.[18]

In another case[19] on the determination of the proportionate quality control fee, the *Kúria* interpreted the Act and ruled that proportionality is a matter of fact and disproportionality has to be proved by the Authority. The Authority is obliged to compare the actual quality control costs borne by the trader and the fees charged. The Authority should not rely exclusively on the fact that the fee was calculated at a flat rate, because it is only the method for calculating the fee.

16 Kúria Kfv. 37.231/2012, Kúria Kfv. 37426/2012/8, Kúria Kfv. 37587/2012/11.
17 Kúria Kfv. 37587/2012/11.
18 Kúria Kfv. 37587/2012/11.
19 Kúria Kfv. 37.231/2012.

The trader cannot charge for services that are part of its normal operational activities. It cannot charge for the suppliers for putting products on the shelves, for controlling the stocks or the expiry of the products.[20]

Usually the lower courts dealt with the legality of fees included in the standard contract terms and published on the trader's website and the fees actually charged. The mismatch between the published standard contract terms and the actual fees charged was for example the subject of case K.30214/2011/36 at the Fővárosi Törvényszék (Metropolitan Court).

Discriminatory retail prices based on the basis of the country of origin. Under Article 3 (2) u) the trader cannot set discriminatory prices, on the basis of the country of origin of products considered identical on the basis of their composition and organoleptic properties. This amendment was introduced in 2012 and came into effect in August 2012. In September 2012, NÉBIH launched its proceedings against Tesco for UHT milk originating in Slovakia. The margin set for Hungarian UHT milk was discriminatory compared with several Hungarian UHT milk products. The fine imposed by NÉBIH was 38 million forints (approximately EUR 116,000). The plaintiff claimed at the *Kúria* that the imposition of the fine is contrary to Articles 34 and 49 TFEU and requested that the court should initiate a preliminary ruling procedure. The *Kúria* did not refer the case to Luxembourg, but upheld the fine. According to the reasoning, there was significant difference in the margin of the Slovak and Hungarian products and the company could not justify this discrimination with any commercial or business reasons.[21]

III. Nature of infringement and scope of public enforcement

1. Nature of prohibited practices

According to Article 2 b) 'trading practices' shall mean the practices or conduct of, or omission by a trader or any person or organization acting on behalf of or for the trader *relative to the purchasing or selling of products.*

The Act comprises an exhaustive list of unfair trading practices in Article 3:

(1) Unfair trading practices are prohibited.

(2) The following shall be construed as unfair trading practices:

a) prescribing undue risk pooling arrangements resulting in one-sided advantages to the trader as against the supplier;

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20 Metropolitan Court – Fővárosi Törvényszék K.30213/2011/19.

21 Kúria Kfv. III.37.165/2014, EB 2014.11.K41.

b) introducing contract terms – outside the liability arising out of or in connection with performance not conforming to the contract – stipulating a buy-back or take-back obligation;
ba) upon the supplier relating to products supplied to the trader, with the exception of products first introduced to the trader's inventory and remaining there, as well as close-to-expiry products accepted from the supplier, and which remained in the trader's inventory following the date of minimum durability or the "use by" date, and/or[22]
bb) upon the supplier relating to products supplied to the trader, at a price that has been incorrectly reduced by comparison to the purchase price in light of the product's attributes and further use by the supplier;
c) passing the costs of actions benefiting the trader's business upon the supplier in whole or in part, such as in particular the costs of starting up and operating the business, or the costs of transporting the products from a logistics unit used by the trader to another logistics unit or to a store, by the trader himself or by way of involving a third party;[23]
d) charging any fee to the supplier for being admitted to the trader's list of suppliers, or for including, and keeping, the supplier's product in the trader's stock of goods, by the trader himself or by way of involving a third party;
e) charging any fee to the supplier – in any way or form – by the trader himself or by way of involving a third party:
ea) for services not actually provided,
eb) for activities performed by the trader in connection with selling products to the final consumer, which, however, do not constitute extra services to the supplier, such as in particular placing the supplier's products in a defined place of the trader's store in a manner without any extra services to the supplier, or for the storage or refrigeration of the products, or for the keeping of live animals,[24]
ec) for the provision of services which the supplier did not solicit or which does not benefit the supplier, and which the trader has unilaterally prescribed,
ed) for services solicited by the supplier and in fact supplied by the trader in connection with marketing the supplier's products, however, at an

22 Effective as of 2012.
23 Effective as of 2011.
24 Effective as of 2012.

excessive rate, or calculated based on the tax applicable if the fee charged for the service is determined as a percentage of the price at which the product is supplied;[25]

f) requiring the supplier to contribute to any discount granted by the trader to final consumers, for a duration longer than providing such discount to consumers, or for a quantity greater than originally agreed upon, in whole or in part, or requesting the supplier's contribution in excess of the discount granted by the trader to final consumers, furthermore, non-compliance with the provision set out in SubArticle (2a);[26]

g) passing upon the supplier the costs incurred in consequence of any legal action taken against the trader by an authority for any infringement on the trader's part;

h) effecting payment of the purchase price – except where performance is not conforming to the contract – to the supplier, or to the order of any other person the supplier has indicated to the trader;[27]

ha) more than thirty days after the trader or any person acting on behalf of or for the trader has taken possession of the product [in the application of Paragraph *h)* hereinafter referred to as "delivery"], if the supplier delivers the invoice properly made out to the trader within fifteen days from the date of delivery of the product,

hb) more than fifteen days upon receipt of the invoice properly made out, if the supplier delivers the invoice properly made out to the trader more than fifteen days upon the date of delivery of the product;

i) requiring a price reduction for the trader if making payment within the period of payment stipulated;

j) excluding the applicability of default interest, contractual penalty or any other additional obligation against the trader intended to ensure performance of the contract;

k) with the exception where products are made under the trader's brand name, binding the supplier to grant exclusive sales right to the trader without offering proper compensation in return, or demanding the best conditions for the trader relative to other traders;

l) applying any contract term not originally included in writing in the contract between the trader and a supplier, if such term is not inserted into the contract in writing within three working days from the supplier's express request therefor;

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25 Effective as of 2012.

26 Effective as of 1 February 2011.

27 Effective as of 2012.

m) the trader placing an order for the supplier's product, or for making changes in such order, beyond a reasonable period of time;
n) altering the terms of the contract by the trader unilaterally for reasons that cannot be objectively verified and that are not attributable to external circumstances having regard to the trader's operation;
o) failing to publish the standard service agreement provided for in SubArticle (5), derogating from the standard service agreement published, and the trader applying any condition not therein provided for;
p) the trader imposing any restriction as regards the lawful use of a trademark by the supplier;
q) the trader offering products to final consumers at prices below the price invoiced by the supplier or, if produced by the trader himself, below cost – covering general operation costs – not including the case where a campaign not exceeding fifteen days is held for the clearance sale of inventories of goods – notified to the agricultural administration body in advance – due to the trader going out of business or changing profile, as well as reduced-value goods (including close-to-expiry products of which the trader has extensive quantities for unforeseen reasons);[28]
r) charging to the supplier – in any way or form – any quantity-based price reduction, commission or fee in connection with products sold by the trader, with the exception of any subsequent proportional price reduction in connection with the commercial attributes of the product granted to the trader as an incentive for increasing the quantity of products marketed, on the basis of extra sales achieved by comparison to previous sales levels established by the parties, or to an estimated level considered commensurate without taking into account the tax applicable to the product in question;[29]
s) the trader's failure to reimburse within the time limit provided for in Paragraph h) the supplier the public health product charges payable by the supplier on products supplied to the trader;[30]
t) non-compliance with the provisions set out in SubArticle (2b) or (2c);[31]
u) setting the retail price charged to the final consumer of products discriminatively, on the basis of the country of origin of products considered identical on the basis of their composition and organoleptic properties.[32]

28 Effective as of 2012.
29 Effective as of 2012.
30 Effective as of 2011.
31 Effective as of 2012.
32 Effective as of 2012.

Regarding the u) point, setting discriminatory margins, the European Commission has launched an infringement proceeding against Hungary for infringing Article 34 of the EU treaty, the rule on the free movement of goods (Kovács, 2018; European Commission, 2018).[33]

2. The most common types of infringements

In the last two years (2016 and 2017), the following fines for violating the substantive provisions were imposed by NÉBIH.

In 2017:

- 9 cases for violation of Article 3 (2) point h) (late payment),
- 6 cases for violation of Article 3 (2) point q) (pricing below price invoiced),
- 4 cases for violation of Article 3 (2) point f) (discounts),
- 2 cases for violation of Article 3 (2) point ea) (charging fee for services not provided).

In 2016:

- 8 cases for violation of Article 3 (2) point q) (pricing below price invoiced),
- 5 cases for violation of Article 3 (2) point r) (quantity based price discounts),
- 4 cases for violation of Article 3 (2) point h) (late payment),
- 4 cases for violation of Article 3 (2) point u) (discriminative prices based on origin),
- 2 cases for violation of Article 3 (2) point f) (discounts),
- 1 case for violation of ea) (fee for services not provided).

[33] MEMO/18/1444, 8 March 2018. The Commission decided today to send a reasoned opinion to Hungary on the grounds that the national rules on retail sale of agricultural and food products are incompatible with EU law. Under Hungarian law, retailers are obliged to apply the same profit margins to domestic and imported agricultural and food products. This may discourage sales of imported agricultural and food products in comparison to domestic ones, as it may make it more difficult for importers and retailers to offer imported products, which are usually less well known to the domestic consumer, at more attractive prices. In February 2017, the Commission opened the infringement proceedings by sending a letter of formal notice. The Commission raised concerns that these rules go against the principle of the free movement of goods (Article 34 of Treaty on the Functioning of the EU, TFEU) and undermine the free formation of selling prices of agricultural products on the basis of fair competition (EU Regulation No 1308/2013 establishing a common organisation of the markets in agricultural products). Since the Hungarian authorities maintain their position, the Commission has now decided to send a reasoned opinion. If Hungary fails to act within two months from the receipt of the reasoned opinion, the case may be referred to the Court of Justice of the EU.

3. Subjective scope of enforcement

According to Article 2:
- 'trading practices' shall mean the practices or conduct of, or omission by a trader or any person or organization acting on behalf of or for the trader *relative to the purchasing or selling of products* (Article 2 b);
- '*agricultural and food product*' shall mean any product covered by Article 2 of Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, that can be made available to the final consumer without further processing (Article 2 d).

4. Conditions for the application of the law

There are no other conditions for the application of the law. If the matter falls *ratione personae* and *materiae* to the scope of the Act, the prohibitions are to be applied, notwithstanding the market position (e.g. dominance), the bargaining power of the supplier or the turnover of the supplier.

5. Economic agents covered by the law (*ratione personae*)

The Act shall apply to (Article 2):

a) natural persons engaged in the production and/or processing of agricultural and food products (including small-scale agricultural producers, private entrepreneurs and family farmers), legal persons, unincorporated business associations, as well as producer organizations and producer groups,
b) natural and legal persons, unincorporated business associations operating as resellers of agricultural and food products unaltered and without processing, including organizations considered affiliated to these according to Act C of 2000 on Accounting (hereinafter referred to as 'Accounting Act'), as well as third parties providing services to such persons and organizations having regard to purchasing and selling the products, hence establishing direct commercial ties with the suppliers of such products.

Article 2 (2) For the purposes of this Act:

a) **'supplier'** shall mean:

aa) a natural or legal person, or unincorporated business association producing or processing agricultural and food products, also if recognized as a producer organization or producer group provided for in specific other legislation, or if exclusively controlled by such organization or group, who sells the products produced or processed to a trader, and

ab) a natural or legal person, or unincorporated business association who sells agricultural and food products to a trader, provided that it is not exclusively controlled by the trader or not considered affiliated to the trader according to the Accounting Act, furthermore, in the case of joint purchasing

not belonging to a solidarity purchase group with the trader.

c) **'trader'** shall mean a natural or legal person, unincorporated business association, or organization affiliated to these under the Accounting Act not exclusively controlled by a supplier or not considered under the Accounting Act affiliated to a supplier, furthermore, in the case of joint purchasing all companies belonging to a purchase group, acting as a reseller of agricultural and food products purchased from suppliers directly or indirectly within the framework of gainful business activities unaltered and without processing, as well as third parties providing services to such persons and organizations having regard to purchasing and selling the products, hence establishing direct commercial ties with the suppliers of such products.

IV. Public enforcement institution and proceedings

1. Institution in charge of public enforcement

The UTP is applied by NÉBIH, a public administrative body supervised by the Ministry of Agriculture. In case the practice falls within the scope of Article 21 of the Competition Act (abuse of a dominant position, the national counterpart of Article 102 TFEU), the Hungarian Competition Office (GVH) has competence to decide the case. It needs to be noted that since 2014, the Trade Act extended the definition of dominant position to company groups with a consolidated net income exceeding HUF 100 billion in daily consumer products. If the practice is being investigated by the GVH under the Competition Act, NÉBIH has to suspend its own proceedings. To my knowledge, under the new net income provision, no GVH proceedings were launched against suppliers.

2. Type and principles of proceedings

Administrative proceedings investigated under the General Public Administrative Act (Act CL of 2016). The deadline for closing the procedure is 45 days (Article 4 (2)). The procedure can be launched *ex officio* or upon a complaint.

NÉBIH has extensive rights to investigate the case, similar to the procedure based on the infringement of the Competition Act. Under Article 4 (3)[34] a state official duly authorized to conduct on-site inspections of the competent authority shall, in order to monitor compliance with this Act and for gathering evidence for ascertaining the relevant facts of the case, be entitled:

a) to enter the premises and facilities to which the inspection pertains;
b) to inspect documents and data medium to which the inspection pertains, or which are related to the inspection-in accordance with the regulations on data protection and confidentiality-and to make copies or abstracts of such documents and data medium;
c) to make sound and video recordings on site to document the proceedings;
d) to open any sealed-off premises, and to enter such properties, commercial establishments or work areas under his own authority without the consent of the persons in the premises, also if said properties serve as residences as well, and to inspect the means of transport and documents;
e) to request the trader inspected, and any supplier affected by the proceedings to disclose specific data from its records and registers within the prescribed time limit.[35]

As for sanctions for procedural law infringements, an administrative penalty between 5,000 and 500,000 forints (approximately EUR 1,500) may be imposed upon any party to the proceedings and any person who is required to cooperate in the process to ascertain the relevant facts of the case:

a) if during the course of the proceedings, they perform acts or engage in conduct which are aimed at or result in the protraction or obstruction of the proceedings or making it impossible to reveal the relevant facts of the case; or
b) if they fail to comply with the request provided for in Paragraph e) of SubArticle (3) in due time for reasons within their control.

34 Effective as of 1 July 2016.
35 Effective as of 1 July 2016.

3. Fines and other sanctions

3.1. Infringement decisions and fines

Under Article 6, the amount of the supervisory fine shall be between one hundred thousand 100,000 and 500 million forints (approximately from EUR 300 to EUR 1.5 million), but not exceeding 10% of the trader's net turnover from the financial year previous to the date of the ruling establishing the infringement.[36] The amount of the fine shall be determined with regard to all relevant circumstances, in particular to the scope and gravity of the interest violated, the duration of the unlawful conduct and any recidivism where applicable, and the advantage gained by such infringement, and in accordance with the economic importance of the trader.[37]

Recidivism is also regulated by the Act.[38] Where a trader repeatedly engages in any form of unfair trading practices – excluding the conduct provided for in paragraph q) of SubArticle (2) of Article 3 (pricing below the price invoiced) – within two years after the fine was imposed or after the commitment was approved, the amount of the supervisory fine may not be less than one-and-a-half times the fine that was imposed previously. In any case it shall be between 500,000 and two billion forints (from EUR 1,500 EUR to EUR 6 million), with the provision that it may not exceed 10% of the trader's net turnover from the financial year previous to the date of the ruling on the infringement.[39]

If the fine cannot be recovered from the trader (legal person), it shall be executed from any member or executive officer held accountable at

[36] Under Article 6(3) the net turnover shall be determined relying on the consolidated net turnover shown in the annual account or simplified annual account (hereinafter referred to collectively as "financial report") filed for the financial year previous to the date of the of the ruling on the infringement. If the trader did not operate for a full year, the figures shall be calculated proportionately for the applicable period. If there is no reliable information available relating to the trader's net turnover for the financial year previous to the date of the ruling on the infringement, the amount of the fine shall be determined based upon the net turnover of the last financial year for which the books are closed officially. In the case of traders who do not have annual accounts, the business plan for the year when the procedure was opened, or failing this, the net turnover the trader has indicated upon the authority's request, calculated according to the provisions of the Accounting Act on interim balance sheets for the day when the procedure was opened shall be taken into consideration.

[37] Article 6(7).

[38] Article 6(4).

[39] Effective as of 2011.

the same time the infringement was committed for such debts, or from any person who is responsible by law for the liabilities of the legal person.

Under the amendment of Act CLXXXIII of 2013 (effective as of January 2014) all administrative bodies in Hungary shall apply a warning, instead of a fine, to small-and medium-sized undertakings for their administrative violations if the law was breached for the first time.[40]

3.2. Fining policy

Unlike the Hungarian Competition Authority, NÉBIH does not have a publicly available fining notice or guidelines.

3.3. Commitment decisions

NÉBIH is entitled, but not obliged to close its proceedings with the adoption of a commitment decision if within 10 days after the receipt of the statement of objections, the trader submits a written commitment to align its conduct with the law. The Authority is not obliged to close its proceedings with a commitment decision. A commitment decision does not establish either the existence or absence of an infringement.

Acceptance of commitments is ruled out in the following cases: (a) the commitments offered did not cover all findings of infringements in the Statement of Objections, (b) recidivism, and (c) grave infringements[41].

Commitment decisions shall not prevent the opening of a new proceeding if circumstances have changed significantly or if the decision was based upon substantial misleading facts submitted by the trader.

Fulfilment of commitments are monitored by the Authority. In case of non-compliance with the commitments, NÉBIH shall impose a fine. A fine is not imposed if the enforcement of commitments is not justified due to changes in the relevant circumstances.

In 2017, out of 19 decisions, the Authority closed its proceeding with a commitment decision in 5 cases. In 2016, 7 cases out of 26 were closed by commitments.

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40 Act XXXIV of 2004 on small-and medium-sized undertakings and their development. Article 12/A was introduced by Act CLXXXIII of 2013.

41 The infringement is particularly serious or resulted in massive harm or damage to a great number of suppliers.

3.4. Prohibition of the application of standard contract terms

The Authority may prohibit the trader to apply its standard terms provided that the term is not set out clearly, if the service provided and its consideration is not clearly defined or the charge imposed by the trader is clearly defined or the fee charged is not proportionate to the costs.

3.5. Publication of decisions

The name (corporate name) and address (registered office) of traders engaged in unfair trading practices shall be made public on the website of the agricultural administration body, and also in the official journal and on the website of the ministry in charge of the agricultural sector. This should include the finding of the infringement, the amount of fine levied, and the withdrawal of the decision where applicable, an indication if judicial review has been opened, the contents of the final judgment, and the decision ordering the commitment. Such data shall be removed from the website after two years have lapsed from the operative date of the decision on the infringement, following which the data may not be republished.

V. Conclusions

Hungarian law contains a very detailed regulation of unfair business practices in the food supply chain. Since its enactment 10 years ago, nine amendments rendered the original legal provisions stricter and more demanding to comply with for suppliers.[42] On the one hand repeated modifications can raise the question of legal certainty, on the other hand some modifications were introduced to clarify the terms used by the Act or were triggered by the case-law of the national judiciary interpreting provisions of the Act.

The UTP is addressed to each trader and supplier active in the agricultural and food supply chain, notwithstanding its market position and turnover. In this regard the UTP is not a tool to address only superior bargaining position cases.

The existence of a dominant position under competition law or significant market power under the Trade Act is not required by the UTP and it is not based on turnover neither. The agency (NÉBIH) acts in the public

[42] Out of the nine amendments some dealt with procedural rules as the new Administrative Code came into effect.

interest and its investigative powers are similar to those of the Hungarian Competition Authority. The ceiling of fines imposed by NÉBIH is also similar to those of the Competition Authority, but NÉBIH does not have fining guidelines. It is calculating the amount of fines based on all the circumstances of the case. This raises the question whether its fines are non-discriminative and proportionate. The UTP is *lex specialis* to the Competition Act and to the Trade Act. Proceedings launched by the Hungarian Competition Authority under Article 21 (abuse of a dominant position) exclude the competences of NÉBIH. Since 1 January 2016, an amendment of the Trade Act defines the notion of the dominant position in the food retail market. In this amendment an irrebuttable presumption was introduced into the application of the Competition Act, according to which the dominant position exists in the retail market for food products if the consolidated net income of the undertaking exceeds 100 billion forints (approximately EUR 303 000 000). This amendment adds an additional layer to the application of the UTP, exposing the companies with a high turnover to the application of prohibition of abuse of a dominant position under the Competition Act. Basing the notion of dominance on the turnover threshold is alien to common principles based on market strength. With this amendment the personal scope of Article 21 is extended and the prohibition of pricing abuses applies to undertakings with a high turnover.

Returning to the application of the UTP, it is a positive development that traders having a turnover over 20 billion forints have to publish on their own website and on the website of NÉBIH their standard contract terms under which they buy agricultural and food products. Currently 33 undertakings published their standard contract terms on the website of NÉBIH. This transparency improves the bargaining position of suppliers and ensures non-discrimination in contractual relationships. NÉBIH has imposed fines in some cases where the traders themselves did not follow their own standard contract terms.

Currently the detailed UTP provisions list 27 unfair trade practices and additionally NÉBIH has the competence to scrutinise the standard contract terms of high turnover traders, hence the Authority can prohibit the trader to apply its standard terms provided that the term is not set out clearly, if the service provided and its consideration is not clearly defined or the charge imposed by the trader is clearly defined or the fee charged is not proportionate to the costs.

Concerning the unfair trading terms, some seem to have more practical effect on the operation of the traders than others. Probably the obligation to pay the purchase price in 30 days after delivery is the most difficult one

as the jurisprudence shows. Furthermore, the prohibition of buy-back or take-back obligations and the prohibitions of fees for listing and stocking the products are the most important ones. The general prohibition of unilateral contract amendment by the trader (a rule common in consumer contract law) and the obligation to charge for services provided by the trader proportionate fees or the prohibition of exclusive dealing and the most favoured nation clause also have a relevance in practice and are regulated differently in general contract law. Concerning the pricing obligations, the prohibition of selling below costs and invoiced prices, and the prohibition of discriminatory pricing based on the origin of the product are worth mentioning.

As we have seen above it can be raised whether the prohibition of setting a discriminatory margin is in compliance with Hungary's obligations under the free movement of goods after the European Commission had sent a reasoned opinion on that issue to Hungary.

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LITHUANIA

I. Introduction

1. Short historical background

When analysing the food supply chain in Lithuania, first you need to have in mind the historical context. During the 1918–1940 period of independence, Lithuania was an agrarian country. About 77% of the population lived in rural areas, and about 76% of the working population worked in the agriculture sector. During 1922–1929 a successful land reform was carried out in Lithuania. Before the land reform, the land plots owned by landlords consisted of about 26% of the whole national territory. During the land reform, landlords' estates in excess of 150 hectares were nationalised and distributed among farmers. Farms of 8–20 hectares were the common result of the land reform. Due to the reform, agricultural production steadily increased, food exports rose and cooperation developed. For example, the "Lietūkis" – Lithuanian Union of agricultural co-operatives was established, with about 200 members. The co-operative dairy company "Pienocentras" was founded. Joint-stock company "Maistas" had 5 factories and its share-

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holders were farmers. Joint-stock company "Cukrus" had 3 factories. Retail trade was dominated by small traders and farmers often sold their own production in local markets directly to consumers (Povilaitis, 1997; Norkus, 2012, p. 5–52).

During the Soviet period (1940–1990), all land was nationalized and private business, including trade, was banned (Zundė, 1962). After independence in 1990, three important processes began – the restitution of nationalized property, privatization of state property and land reform. First of all, 3 hectares of land per person was distributed to people living in the countryside. Second, the nationalized land was returned to former owners or their heirs. On July 4, 1989 the Law "On the Farmers of the Republic of Lithuania" was adopted, which was the legal basis for the private acquisition of land. The Soviet collective farms were gradually liquidated, some of them transformed into agricultural companies. The land reform has not yet been completed. All of this has led to the emergence of chaos in agriculture, proliferation of small farms and a decline in agricultural production. An inadequate privatization policy, insufficient entrepreneurship of a large part of society and lack of proper financing have led to the absence of small traders in the retail sector.

2. Present situation

There are three main groups of players in the food supply chain: food producers, processors and sellers.

2.1. Food producers

The population of Lithuania in 2018 was 2.9 million. About 1/3 of the population live in rural areas. According to data of the Department of Statistics of Lithuania, 257,800 employees worked in agriculture in 2016 – about 8% of the population. This is down from 545,000 employees in 2003, meaning that the number of people employed in agriculture decreased by half in 15 years (Miknevičius, 2018). Agriculture, along with forestry and fishing, contributed 3.3% of GDP of Lithuania.[1] The value of gross production in agriculture, forestry and fisheries amounted to EUR 3,288

[1] Department of Statistics of Lithuania, Facts and Figures, https://osp.stat.gov.lt/statistiniu-rodikliu-analize#/ (last visited on 17.09.2018).

million in 2016. The share of agriculture, forestry and fisheries in total Lithuanian exports was 18.3%.[2]

The structure of the agriculture sector in Lithuania consists of the following sectors: crop production amount to 43.5%; animal production – 7.4%; mixed farming – 15.4%; other 33.7% (VĮ Žemės ūkio informacijos ir kaimo verslo centras, 2018, p. 16–18).

There are three different legal forms of business in the agriculture sector. First, individual farmers whose activities are governed by the Law on Farmer's Farm of May 4, 1999.[3] The farmer is a natural person and his activity does not require the establishment of a legal person. However, the farmer has the right to employ employees. At present, there are about 137,900 such "individual" farms in Lithuania. About 98.55% of all land holdings are owned by farmers and only about 1.45% are owned by legal persons – agriculture companies and co-operatives (VĮ Žemės ūkio informacijos ir kaimo verslo centras, 2018, p. 16–18). As the number of farmers decreases, the share of legal persons in agriculture sector increased from 0.93% in 2013 to 1.45% in 2018.

During 2013–2017, the number of individual farms decreased by 13.7%. The average size of such farms is about 20 hectares and they constitute about 83% of all farms. Farms with a size of 5 ha and less comprise 48% of the total. For various reasons, including demographics, the number of tiny farms is decreasing while there is an increase in the number of bigger farms. The number of large farms with an area of 50–100 hectares has increased 14% and farms with an area of more than 100 hectares – by 39% (Lithuanian Institute of Agrarian Economics, 2018, p. 8–10). It is natural that for small farms it is more difficult to compete in the market. They face not only the problems of financing but also the realization of production, and their negotiating power is considerably weaker than that of large farms. The government is using a variety of measures to help farmers to realize their products faster, for example by encouraging the establishment of farmers' markets in cities.

The second type of farm producers are agricultural companies having the status of legal persons. There are about 417 agricultural companies in Lithuania, and while they account for about 13% of all land plots, they produce about 30% of all agricultural output. The average size of an agricultural company is about 856 hectares (Reakcija į ūkininko laišką:

[2] Žemės ir maisto ūkio 2016 m. apžvalga. https://zum.lrv.lt/uploads/zum/documents/files/LT_versija/Veiklos_sritys/Statistinė%20informacija/Žemės%20ir%20maisto%20ūkio%202016%20metų%20apžvalga%20(03).pdf (last visited on 17.09.2018).

[3] Official Gazette (Valstybės žinios) 1999, No. 43-1358.

žemės ūkio bendrovės save laiko svarbiais ekonomikos ramsčiais, 2018). The agricultural companies in Lithuania are relatively large farms and their competitive and bargaining power is higher than that of small and medium-sized farmers.

Thirdly, there are the agricultural cooperatives. There are about 22 agricultural cooperatives in Lithuania at present time. Unfortunately, despite the fact that the Government encourages co-operation in agriculture, it has not been popular.

2.2. Food processors

According to the Ministry of Agriculture, there were 980 companies which operated in food industry in Lithuania in 2015. About 42,279 employees worked in this sector in 2017. During the period of 2011–2015, the number of food production enterprises increased by 16.3%. The share of small and medium companies, mostly family businesses, in the sector is 20.9%. The number of such enterprises during 2013–2017 decreased by 14.4%. This phenomenon can partly also be explained by the fact that small enterprises are confronted with marketing and sales and that their bargaining power is weaker than of large enterprises. The largest number of enterprises is engaged in the production of meat products (167), fish products (58), processing of fruits and berries (46), dairy products (33), processing of grain (28). One company has an average of 43 employees. However, 52% of all food processing companies are very small enterprises (less than 10 employees). The share of companies with 10–49 employees is 30.2% and medium-sized companies (50–249 employees) 13.6%. Only 4% of processing companies have more than 250 employees (Lithuanian Institute of Agrarian Economics, 2018, p. 33–35). Very small and small enterprises do not have sufficient bargaining power to negotiate favourable conditions for the sale of their products, finding it harder to compete in the market.

2.3. Retailers

In the retail sector small and medium-sized traders dominated until 1995 – their share of the market was about 80%. However, since 1995, their number started to decrease significantly as they were gradually pushed out by Lithuanian and foreign supermarkets. During the period of 2000–2004, the number of large supermarkets more than doubled, while the number of small shops decreased by 15% and the number of kiosks by 40%. Another negative factor in the development of the retail sector is the fact that large

shopping malls were created in city centres, which was one of the reasons why small retailers were pushed out of town centres (Tvaskienė, n.d.). The attempt was made to restrict the establishment of major retail chains in cities, but in the end no relevant laws were adopted. At present, the Government is considering the possibility of prohibiting big retail centres from opening on weekends and holidays (Premjeras prakalbo apie prekybos tinklų darbo laiko ribojimą, 2018). Also, in 2009 an amendment to the Price Law was adopted, which limited the mark-up fees of retail companies to 20% but the law was vetoed by the President and it did not come into force. Finally, the Law on Prices was abolished as from 1 May,2015.

Currently, four retail chains – Maxima, Iki, Norfa, Rimi – account for about 71% of the retail market. Since 2016, there is another retail network on the Lithuanian market – the German retail network Lidl. Maxima has 237 stores, Iki – 233, Norfa – 143, Rimi – 56 and Lidl – 38 stores.

The competition among chains is very strong. For example, the Finnish supermarket chain Prisma discontinued its activity in Lithuania in 2017 (Prekybos tinklas "Prisma" nutraukia veiklą Lietuvoje ir Latvijoje, 2017). Concentration of the market in this area is supervised by the Competition Council. In 2018, the Competition Council did not allow the merger between Rimi and Iki.[4]

2.4. The problem of unfair trading

The complicated situation in the food supply chain is illustrated by the purchase (procurement) prices of agricultural products and the retail price of final products. For example, the procurement price for raw milk in Lithuania is 0.26 EUR/Lt. The wholesale (producer) price for drinking milk of 2.5% fat is 0.50 EUR/Lt and the retail price – 0.89 EUR/Lt (VAT included). The milk procurement price in Lithuania is lower than in Estonia, Latvia and Poland, and well below the European Union average. As a result, the number of dairy producers since 2016 by 2017 decreased by 11.5%. Farmers who have few cows are particularly hard pressed because milk purchasers apply higher procurement prices for suppliers who supply large quantities of milk. Meanwhile, an absolute majority of dairy farms have very few cows. For example, farms with 1–2 cows account for 64% and with 3–5 cows – 18% (VĮ Žemės ūkio informacijos ir kaimo verslo centras,

[4] Decision of April 17, 2018 of the Lithuanian Competition Council. Retrieved from: http://kt.gov.lt/uploads/docs/docs/3416_2c96cf77f8d01190c6d65e56071d0c1f.pdf (last visited on 17.09.2018).

2018, p. 18–19). The wholesale (producer) price of butter is 6.19 EUR/kg, and the retail price – 10.17 EUR/kg (VAT included). The wholesale price of beef and veal is 2.59 EUR/kg and retail price – 7.15 EUR/kg. The wholesale price of pork is 2.08 EUR/kg, and the retail price – 4.25 EUR/kg.[5]

Retail food prices have a tendency to increase. For example, the retail price of eggs has risen by 34.5% in 2013–17 and the price of butter 36% (Lithuanian Institute of Agrarian Economics, 2018, p. 41–42). In general, prices of agricultural products for consumers rose by 21.3% since 2010, while the average EU increase in the same period was 13%.

The increase in prices is usually determined not by the prices of farmers, but by the surcharges applied by food processors and traders. For example, the share of farmers price in the structure of milk prices in 2017 was 25.4%, the share of the price of purchasing and processing enterprises 27.7% and the share of the price of the retail trade 29.5%, with VAT taking up the rest. The structure of the price of grain was as follows: the price of grain growers was 30.7%, the price of mills and traders 52% and the rest was VAT.

The grain production sector is also in a difficult situation. Due to climate conditions, farmers often do not grow the quantity and quality of the grain indicated in pre-seed grain purchase contracts. Such a situation occurred in 2017 due to rain. In 2018, due to drought farmers did not produce about 20–40% of the expected harvest. Meanwhile, pre-seed grain purchase contracts envisage heavy penalties for farmers for non-performance. Since the pre-seed grain purchase agreements are prepared by grain purchasers and the terms relating to penalties are often in small print, farmers, often do not pay due attention to them (Venslaviškis, 2018). Farmers try to challenge penalties in courts, arguing that they have failed to perform pre-seed contract properly due to *force majeure*, but in the majority of cases such arguments are reject by the courts.[6] Purchasers of grain who, in order to buy the quantity of grain they want, must buy them at higher prices from other sources, seek to recover the difference from farmers who failed to meet their contract obligations. For example, in one case, damages in the amount of 282,981 LTL (EUR 81,956) was awarded to the purchaser of grain from a farmer.[7] However, there are also good examples of co-operation between producers of agricultural products and retailers. For example, a co-operative called "Quality of Lithuanian Farm" has successfully co-operated with Maxima network for 9 years, with sales of 1 million EUR in 2018 (Vizbarienė, 2018).

5 http://www.produktukainos.lt/?mid=14 (last visited on 17.09.2018).

6 Cases No 3K-3-304-684/2015, No 3K-3-1/2014 and 3K-3-2/2014 of the Supreme Court of Lithuania.

7 Case No 3K-3-637/2013 of the Supreme Court of Lithuania.

Relationship between food producers (processors) and retail companies are also complicated. According to the Competition Council, investigations made during 2012, 2015 and 2018 revealed the following unfair clauses in contracts:

(i) disproportionately large penalties for suppliers for breach of contract;
(ii) suppliers are not allowed to set different prices for contracts with other retailers;
(iii) the contracts provide for the application of fixed commercial concessions to retailers;
(iv) contracts allow retailers to return unsold goods to suppliers;
(v) suppliers pay a "shelf-book" fee and a "shelf" fee;
(vi) long payment terms for the supplied goods;
(vii) retailers primarily promote sales of their branded products;
(viii) retailers prevent suppliers from selling goods to other retail chains;
(ix) retailers unilaterally and retrospectively change the terms of contracts, in particular regarding the quantity of goods and discounts;
(x) suppliers are obliged to accept loss of retailers due to dropped goods, etc. (Competition Council of Lithuania, 2018, p. 15–16).

2.5. The status of relevant legislation

The problem of relations between producers of agricultural products, food processors and retailers in Lithuania has been and continues to be the main focus of politicians. In political debates, opinions are usually divided into two parts: the left parties generally advocate a more detailed and rigorous regulation of such relationships. Their priority is protecting small farmers, small producers and small retailers, while, accordingly, limiting the power of large food processors and big retail centres. Right-wing parties, especially liberals, are opposed to more detailed and more rigorous regulation that would encompass various prohibitions and restrictions. It should be noted that the long political debate was precisely the reason for not being able to resolve these issues. In many cases, the solutions are now clearly overdue and therefore extremely complicated. For example, it is hardly legally possible to evict large shopping malls from cities to suburbs. However, the current governing majority seeks to introduce a wide range of legal and economic measures against major retail networks. A draft Government action plan has recently been leaked in the press, which provides for the promotion of small business and the limitation of bargaining power of major trading networks. The project proposes the following measures:

(i) the State shall adopt obligatory standard contract terms for contracts between retail chains and suppliers;
(ii) a special State institution shall be set up to supervise compliance with standard contract terms;
(iii) wholesale and retail prices shall be made public in order to determine the retailers‘ mark-up;
(iv) cooperation between suppliers will be encouraged in order to increase their bargaining power;
(v) volatility of food product prices will be constantly published;
(vi) consumers, by means of economic measures (taxes, etc.), will be encouraged to buy food products in markets and small family stores, not in bigger retail chains;
(vii) restricted working hours of big shopping malls on weekends and holidays;
(viii) maximum market shares of major retail chains will be established;
(ix) the Competition Council will be entrusted with the control of suppliers‘ and retailers’ contracts;
(x) the fees paid by small traders for trading space in the markets shall be abolished (Milašius, 2018).

The representatives of the retailers received such proposals critically and it is still not clear whether they will be implemented by amending relevant legislation.

Legislation regulating the abuse of bargaining power and unfair trading practices in the food supply chain can be divided into two categories: general and special. The general legislation applies to all sectors of the economy, while specific legislation is intended to address problems that arise in the food supply chain. The relationship between general and special legal acts is determined by the *lex specialis derogat legi generali* principle. In turn, all legal acts regulating in one or another way these issues can be divided into private law and public law.

2.5.1. General private and public legislations

General private laws are primarily attributable to the Civil Code of July 18, 2000.[8] The following norms of the Civil Code are extremely important:
(i) Article 1.2 providing principles of civil law including principle of good faith and principle of the prohibition of the abuse of rights;
(ii) Article 1.5 providing principles of good faith, reasonableness and justice;

[8] Official Gazette (Valstybės žinios), 2000, No 74-2262

(iii) Article 6.4 providing that both parties of the obligations are obligated to act in accordance with the principle of good faith during the formation, execution and extinction of obligation;
(iv) Article 6.38 providing principles of the execution of obligations;
(v) Article 6.73 providing the right of the court to reduce the amount of the unreasonably high civil penalty;
(vi) Article 6.158 providing the contract law principles of good faith and fair dealing;
(vii) Article 6.163 providing the duty of good faith of the parties of negotiations during the precontractual relationships;
(viii) Article 6.165 providing special duties for the parties using standard contracts terms and special regulation of the formation of contract by accession;
(ix) Article 6.186 providing the nullity of the surprising standard contracts terms;
(x) Article 6.193 providing rules of the interpretation of contracts, especially standard contracts terms;
(xi) Article 6.200 providing principles of the execution of contracts;
(xii) Article 6.204 providing the possibility of the termination or modification of the contract due to changed circumstances;
(xiii) Article 6.228 providing possibility to termination or modify contract due the gross disparity between rights and duties of the parties.

The important general public law is the Law on Competition of March 23, 1999.[9] According to this law, the Competition Council is responsible for the supervision of the retail chains having a significant market share in Lithuania as well as supervision of the other competition restrictive measures.

2.5.2. Special private and public legislation

1. **Law on Paying-Off for the Agricultural Products** of November 16, 1999.[10] This Law provides typical contracts terms for the agricultural products purchase agreements, as well as time limit for the buyer to pay the contract price to the farmer – 30 or 60 days.

[9] Official Gazette (Valstybės žinios), 1999, No 30-856.
[10] Official Gazette (Valstybės žinios), 1999, No 102-2921.

2. **Law on the Prohibition of Unfair Activities of Business Entities Buying--Selling Raw Milk and Trading in Dairy Products** of June 25, 2015.[11] This Law (Article 3) establishes a list of prohibited activities, thus imposing economic sanctions for violations of these prohibitions. The enforcement of the law is carried out by the Agency for Development of Agricultural Business and Market (having replaced the State Enterprise Lithuanian Agency for Regulation of Agricultural and Food Products Market) and the State Agency of Food and Veterinary. Decisions of these control bodies may be appealed to the administrative court. So far, no court practice exists in the application of the provisions of this Law. On June 27, 2016 a group of members of the Parliament (*Seimas*) addressed the Constitutional Court with a petition requesting to investigate whether Article 3 of this Law, which establishes the list of prohibited activities, is not in conflict with the Constitution of Lithuania. Moreover, the Constitutional Court on 20 December 2017 applied to the Court of Justice of the European Union for a preliminary ruling in this case. The Court of Justice gave a number C-2/18 to the present case. The decision of the Constitutional Court is expected in a couple of years. We presume that the Constitutional Court may recognize that the law is contrary to the Constitution for the reasons explained in Section II of this Report.
3. **Law on the Prohibition of Unfair Practices of Retailers** of December 22, 2009.[12] This Law defines the criteria for determining whether a retail company has a significant market power. The Law applies only to those retailers with a high market power. The Law establishes a list of prohibited activities, as well as fines for their violations. The control over the implementation of the Law is exercised by the Competition Council. Its decisions may be appealed to the administrative court. At present, four cases in which this Law has been applied were examined in administrative courts.
4. **Milk Purchase Rules** approved on May 9, 2001 by the Minister of Agriculture Order No. 146.[13] The Rules establish a model purchase contract of milk.

11 TAR, 9.7.2015, No 2015-11209.
12 Official Gazette (Valstybės žinios), 2010, No 1-31.
13 Official Gazette (Valstybės žinios), 2001, No 40-1406.

II. Detailed description of national legislation in Lithuania

1. Privately enforced law

There are not many legal acts in Lithuania, which specifically regulate the abuse of bargaining power in the food supply chain and grant special rights for the suppliers to protect their rights in private litigation. The Law on the Prohibition of Unfair Practices of Retailers is the main legal act, which prohibits the abuse of bargaining power of the retailers towards the suppliers. Part 1 of Article 14 of the Law on the Prohibition of Unfair Practices of Retailers provides that subjects have a right to apply to the court for compensation of the damages, which arose because of the breach of this Law. Therefore, the present Law creates a background for private litigation. However, we are not aware of cases where suppliers would apply to the court for damages basing their request specifically on the alleged breach of the Law on the Prohibition of Unfair Practices of Retailers. One of the possible reasons why the retailers refrain from privately enforcing provisions of the Law on the Prohibition of Unfair Practices of Retailers might be their anxiety concerning future retaliatory actions from the retailers.

Legal acts and a number of provisions of the Civil Code of the Republic of Lithuania, which could be used by the suppliers in the private litigation with the retailers, were reviewed in Section I Part 2.5.

2. Application of the principles of the Directive on unfair trading practices in business-to-business relationships in the food supply chain in Lithuania

Bearing in mind the necessity to address the European Commission's proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain,[14] we would like to make a couple of comments.

To our knowledge, currently no amendments of the current legislation have been prepared in our Parliament in order to prepare for the implementation of the above-mentioned Directive. The Competition Council of Lithuania has referred to the Directive in one of its reports in 2018 (Competition Council of Lithuania, 2018, p. 11). The Competition Council noted that a number of proposals of the Directive are already established in the Law on the Prohibition of Unfair Practices of Retailers. In the opinion of the

14 2018/0082 (COD).

Competition Council, in case the Directive is accepted, some provisions of the Law on the Prohibition of Unfair Practices of Retailers might be changed. However, the Competition Council does not provide details about any modifications. We believe that at least the list of the prohibited actions established in the Law on the Prohibition of Unfair Practices of Retailers would need to be expanded after the adoption of the Directive.

Moreover, in Lithuania there are more legal acts applicable to business-to-consumer relationships in unfair trading area than to business-to-business relationships.

In the Republic of Lithuania, there is the Law on the prohibition of unfair business-to-consumer commercial practices of 21 December 2007[15] and the Law on Advertising[16] of 18 July 2000. These two laws implemented the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').[17] However, the Law on the prohibition of unfair business-to-consumer commercial practices is applicable only between the undertakings and consumers (Navickaitė-Sakalauskienė, 2012, p. 1109–1123). Moreover, both laws are not specifically applicable to the cases that could relate to the abuse of contractual/bargaining power in the food supply chain.

Speaking about business-to-consumer relationship the main legal acts regulating commercial fairness in Lithuania include the Law on Unfair Commercial Practices, the Law on Advertising, the Law on Consumer Rights Protection[18] and of 1 December 2011 amended Article 6.350 of Civil Code, which established general prohibition of unfair commercial practices together with the reference to the special legal acts that regulate unfair commercial practices.[19]

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15 Official Gazette (Valstybės žinios), 2008, No. 6-212.

16 Law on Advertising of the Republic of Lithuania, Official Gazette (Valstybės žinios), 2000, No. 64-1937.

17 OJ L 149, 2005, p. 22.

18 Law on Consumer Protection of the Republic of Lithuania, Official Gazette (Valstybės žinios), 2007, No. 12-488.

19 Law on Amending Civil Code of the Republic of Lithuania. Official Gazette (Valstybės žinios), 2011, No. 129-6108. The Amendment came into force on 1.12.2011. Article 6.350 3 Part states "it is prohibited for the trader to exercise to the buyer unfair commercial practices. Unfair commercial practices kinds and cases are set by laws".

3. Publicly enforced law

In Lithuania, the Law on the Prohibition of Unfair Practices of Retailers entered into force on 1 April 2010.[20] The purpose of the Law on the Prohibition of Unfair Practices of Retailers was to limit the use of market power exercised by the major retailers and ensure a balance of interests in relation to food and beverage suppliers. The Republic of Lithuania was the first country among the Baltic States (Lithuania, Latvia and Estonia) that passed a specific law for the prohibition of unfair actions of retailers.

It is also important to note that the Law on the Prohibition of Unfair Practices of Retailers does not implement any Directive of the European Union.

We presume that the main reason for the passing of the Law on the Prohibition of Unfair Practices of Retailers was political. It is mentioned below in Section IV that the Competition Council initially was hesitant concerning the necessity of passing the Law under consideration. Such an idea also was confirmed in private conversations with the Members of the Competition Council who took office in 2009.

Moreover, it is interesting to note that on 24 September 2009 the Parliament of Lithuania decided to amend the definition of dominance established at the Article 3 of the Law on Competition. Prior to this amendment Part 2 of Article 3 of the Law on Competition provided that unless proved otherwise, an undertaking (except for retailers) with the market share of not less than 40% shall be considered to enjoy a dominant position within the relevant market. The Parliament proposed to amend Part 2 of Article 3 of the Law on Competition with the following sentence: *"There is a rebuttable presumption of dominance of the retail chain in case the market share exceeds 30 percent under the Law on Competition"*. One of the authors of this report[21] had a chance to participate in one of the discussions at the legislative institutions of the State concerning the present amendment and he noted that the Competition Council (in his opinion) was not supporting this amendment. During one of the meetings of around 10 prominent competition law and economic experts in one of the legislative institutions, none of the experts spoke in favour of this amendment. The question that the experts had been requested to answer was whether this amendment could cause any damage to the economy. The answers given suggested that most probably it would not have a definite negative effect.

[20] Official Gazette (Valstybės žinios), No. XI-626, 22.12.2009.

[21] Raimundas Moisejevas.

We believe that one of the reasons for adopting this amendment could have been a fact that MAXIMA LT, UAB (the biggest retailer in Lithuania) had more than 30% in retail market, but less than 40%.

The Explanatory Note to the draft Law on the Prohibition of Unfair Practices of Retailers[22] as a reason for the introduction of this Law put argument that currently the legal acts of the Republic of Lithuania do not prohibit unfair use of market power in the retail sector. The Explanatory Note stated that unfair use of market power in retail causes negative effect to retailers, their investments decrease and it allegedly reduce general competitiveness of the production process in the country.

It is noteworthy mentioning that on 28 February 2007 the Competition Council published a Report on the evaluation of the position of the biggest retailers on the market (Competition Council of Lithuania, 2015). The Competition Council noted that agreements between the retailers and suppliers are vertical agreements and fall into the area of the regulation of the Article 5 of the Law on Competition, which covers anticompetitive agreements. According to the Competition Council, analysis of the agreements between the biggest retailers and the suppliers showed that they do not contain vertical restrictions, which could foreclose the market or negatively affect competition. The Competition Council concluded that the biggest retailers use their market power in order to get higher discounts from the suppliers, force suppliers to pay various fees or fulfil their other requirements. The Competition Council also proposed to prepare the Rules of good practice (Code) that would be aimed to protect suppliers from the unfair practices of the retailers. As we are aware, the Parliament decided to adopt the Law on the Prohibition of Unfair Practices of Retailers instead of the proposed Code.

Moreover, every year the Lithuanian Competition Council publishes extensive monitoring notes that also include some drawbacks concerning the implementation of the law. Two of the most common drawbacks the Competition Council has pointed out are:

a) some prices may slightly increase;
b) retailers with a significant market power may aim at reducing marketing expenses and concluding supply agreements only with big and well-known brands/companies. The Competition Council claims that this may also support the establishment of the very strong position of some suppliers.

Further details about the content of the Law on the Prohibition of Unfair Practices of Retailers are provided below.

[22] Lietuvos Respublikos mažmeninės prekybos įmonių nesąžiningų veiksmų draudimo įstatymo projekto aiškinamasis raštas, 10.9.2009.

4. The relationship between public enforcement law and other acts

4.1. The relationship between the Law on Competition, the Law on the Prohibition of Unfair Practices of Retailers and the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products

We mentioned above that there is a certain relationship between the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products and the Law on the Prohibition of Unfair Practices of Retailers. Part 3 of the Article 1 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk provides that the Law is applicable together with the Law on Competition of the Republic of Lithuania and the Law on the Prohibition of Unfair Practices of Retailers. We believe that there is indeed certain inconsistency between these three legal acts. Some of the inconsistencies will be explained below.

Moreover, it was mentioned above that on June 27, 2016 a group of members of the Parliament (*Seimas*) addressed the Constitutional Court with a petition requesting to investigate whether Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products Law does not contradict the Constitution of Lithuania. Members of the Parliament also alleged that the present Law might contradict specifically certain provisions of the Constitution of Lithuania, which ensure fair competition.

Part 3 of the Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk establishes a list of unfair actions that are prohibited to implement for the buyer of raw milk. We may consider that by the prohibition established in the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk the legislator aimed to ensure legal and economic balance between the interests of sellers and buyers of raw milk. Moreover, the legislator most probably relied on the presumption that the economic power of the buyer of raw milk substantially exceeds the economic power of the seller of raw milk.

We believe that legal necessity to supervise compliance of the agreements concluded by separate undertakings (or groups of the undertakings) to the requirements of honesty would be reasoned in case it is established that there is a substantial difference of the economic and bargaining power between separate undertakings (or groups of the undertakings).

Article 7 of the Law on Competition of the Republic of Lithuania *inter alia* establishes prohibition of abuse of a dominant position. The Law on

Competition regulates abuse of the dominant position the same way as Article 102 of the TFEU and the Court of Justice of the European Union (hereinafter – CJEU). The CJEU in classic *United Brands* case[23] defined the dominant position referred to in Article 102 as a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Definition of the dominant position provided by the Law on Competition corresponds to the practice of the CJEU.

Prohibition to abuse of a dominant position established in Article 7 of the Law on Competition prohibits actions that distort or may distort competition, unreasonably limit ability of undertakings to act in the market or violate interests of consumers. It is prohibited for a dominant undertaking to use its economic strength in order to distort competition. There is a presumption that a dominant undertaking should not use its economic advantages (bargaining power) in relation to other undertakings. It is also considered that a dominant undertaking should not impose unfair conditions on other, smaller, undertakings.

If we compare the list of prohibited actions established at the Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk with the list of prohibitions enshrined in Article 7 of the Law on Competition, we may conclude that some of the prohibited actions are similar. For example, a dominant undertaking has to use the same pricing principles with its counterparts and apply fair prices.

While comparing the prohibition established at the Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk with the prohibition established in Article 7 of the Law on Competition, we can make several conclusions.

First, certain prohibited actions in these two legal acts are quite similar.

Second, prohibition to perform actions prohibited in Article 7 of the Law on Competition is applicable only towards undertakings which have a market power.

Third, the Law on Competition establishes clear criteria based on which we can evaluate whether the undertaking should be viewed as having a market power (economic strength), i.e. a dominant undertaking. However, the Law on the Prohibition of Unfair Activities of Business Entities Buying-

[23] Case-27/76, *United Brands Company and United Brands Continentaal BV v Commission*, EU:C:1978:22.

Selling Raw Milk does not provide any clear criteria for the evaluation whether a specific undertaking (buyer of raw milk) could be viewed as having economic strength or bargaining power. In our opinion, it is wrong to assume that all the undertakings that are buying raw milk should be automatically recognized as having more power in the market (bargaining power) than sellers of the milk.

Fourth, the Law on Competition requires evaluating in every case whether the specific undertaking could be viewed as a dominant undertaking. On the other hand, the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk recognizes that the undertaking (buyer of the raw milk) simply by being at the different level of the production, supply or distribution, automatically is viewed as having bigger economic or bargaining power. We believe that such presumption established at the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk has no legal or economic background.

Fifth, in order to determine whether an undertaking is dominant, one of the most important criteria is evaluation of entry barriers. An undertaking which has a big market share may not be dominant if there are no entry barriers for other undertakings to effectively compete with the incumbent undertaking. On the other hand, if there are high entry barriers then the incumbent undertaking might be protected from competition and might be able to behave to an appreciable extent independently of its competitors, even if its share market is not very high (for example, does not exceed 40%), but exceeds the market share of its competitors.[24] The Lithuanian Competition Council in a decision of 2015 mentioned that while researching the market it was established that an undertaking which aims to enter the market of the purchase of the milk would not face significant barriers to entry and starting business operations would not demand significant financial or other investments.[25] Therefore, the undertaking could become a buyer of raw milk quite easily, without experiencing substantial financial costs. Absence of high entry barriers to the market of the purchase of raw milk, allows concluding that buyers of raw milk do not gain automatically power in the market (bargaining power).

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[24] Resolution (decision) of the Competition Council of the Republic of Lithuania of 17 May 2000 No. 52 "Concerning explanations of the Competition Council concerning determination of the dominant position", Official Gazette, 2000, No. 52-1516, para. 15.

[25] Decision of the Competition Council of the Republic of Lithuania of 30 December 2015 No. 1S-138/2015 "Concerning completion of the research of sectoral market", para. 199. Retrieved from: https://kt.gov.lt/uploads/documents/files/2015-12-30_1S-138.pdf (last visited on 10.10.2018).

It was mentioned that one of the main goals of the Law on the Prohibition of Unfair Practices of Retailers is ensuring the balance of interests between suppliers and retailers having significant market power. It was also mentioned that the Law on the Prohibition of Unfair Practices of Retailers established the list of practices that are prohibited for the retailers to implement towards the suppliers.

Comparing the list of prohibited actions of Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk with the list of prohibited actions established in Article 3 of the Law on the Prohibition of Unfair Practices of Retailers we can make several conclusions.

First, the Law on the Prohibition of Unfair Practices of Retailers provides clear criteria based on which we may decide whether the retailer has a bargaining power. On the other hand, as mentioned above, the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk does not foresee any clear criteria, which could serve as a basis for determination whether specific undertaking (buyer of raw milk) has a power in the market.

Second, the Law on the Prohibition of Unfair Practices of Retailers does not prohibit unfair actions that are prohibited by the Part 3 of Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk. The Law on the Prohibition of Unfair Practices of Retailers does not prohibit retailers that have economic power to apply different prices, refuse to buy the whole amount of production or unreasonably reduce the purchase price of raw milk. Therefore, the Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk establishes stricter list of prohibited actions than the Law on the Prohibition of Unfair Practices of Retailers. It is very doubtful whether such strict legal regulation by the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk could be justified by any objective reasons.

Third, as mentioned above, Article 3 of the Law on the Prohibition of Unfair Practices of Retailers prohibits certain actions not with regard to all retailers, but only those who satisfy certain criteria. On the other hand, as mentioned, the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk provides that the undertaking (buyer of raw milk) simply by acting at the different level of production, supply or distribution is regarded as having economic strength or bargaining power. We believe that such presumption has no legal or economic background. It should be emphasized that in many cases a buyer of raw milk may be just a small company without any "economic strength" and will have no advantage towards the seller of raw milk.

The Lithuanian Competition Council in a decision of 2015 mentioned that raw milk is bought by companies which are processing milk as well as by resale companies.[26] Various economic entities, including cooperative companies, individual companies, joint-stock companies and other are purchasing raw milk. During its research of the market, the Competition Council sent questionnaires to 76 undertakings which are buying raw milk and/or produce milk products. Since there are many undertakings engaged in the business of purchasing raw milk, it is obvious that economic strength and bargaining power of the buyers is completely different. Therefore, there is no basis to conclude that all the buyers of raw milk, independently from their share in the market, financial flows, available technology and other individual economic characteristics have a substantial economic advantage in relation to the sellers of raw milk.

4.2. Inconsistency between the concepts used in the Law on Competition, the Law on the Prohibition of Unfair Practices of Retailers and the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products

The Constitution of the Republic of Lithuania requires that legal regulation established by the Lithuanian laws should be *inter alia* logical, consistent and unambiguous. The heading of the Article 3 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products is "Prohibition of unfair actions of the undertakings". Parts 1 and 2 of Article 3 describe unfair actions of the "undertakings". At the same time part 3 of Article 3 of the same Law describes unfair actions of the "buyer of raw milk". Therefore, it is not completely clear whether Article 3 of the present law aims to define unfair actions of the "undertakings" or only "buyers of raw milk".

It was mentioned above that the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk provides that the Law is applicable together with the Law on Competition of the Republic of Lithuania and the Law on the Prohibition of Unfair Practices of Retailers. Part 2 of the Article 2 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk provides that an "undertaking" shall mean an enterprise, other organisation or its unit, a farmer or other physical person (seller of raw milk, buyer of raw milk, processor of raw milk) who carries out economic and (or) commercial activity in the

[26] *Ibid.*, para. 41.

Republic of Lithuania. Part 22 of Article 3 of the Law on Competition establishes that an undertaking shall mean an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organisation, or other legal or natural persons which perform or may perform economic activities in the Republic of Lithuania or whose actions have effect or whose intentions, if realised, could have effect on economic activity in the Republic of Lithuania. Therefore, the concepts of an "undertaking" used in these two legal acts are not identical. We believe that while passing the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk the legislator did not obey the constitutional principle that the legal regulation has to be logical, consistent and unambiguous.

4.3. Potential contradiction of the part 1 of the Article 5 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products to the Constitution of the Republic of Lithuania

Part 1 of Article 5 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk provides that in the event when a raw milk purchaser is lowering raw milk purchase price, which was established in raw milk sale and purchase agreement, more than by 3 percentage points, the purchaser must justify this lowering of the price and submit this justification to the market regulation agency. Part 2 and 3 of Article 5 of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk provides that the market regulation agency based on the description of the procedure approved by the order of the Minister of Agriculture of the Republic of Lithuania will pass a decision concerning reasonableness of the lowering of price for more than 3 percentage points.

In our opinion, the prohibition to lower the purchase price of raw milk is a price regulation measure which distorts competition. Moreover, we value negatively the obligation imposed on the buyer of raw milk that aims to lower the purchase price of raw milk for more than 3 percentage points to provide a written justification to the Market regulation agency. Such legal regulation might be viewed as limiting the freedom of individual economic activity and economic initiative.

Moreover, a restriction to lower the purchase price of raw milk for more than 3 percentage points may be contrary to the interests of consumers. Such restriction also limits the ability of the purchaser to negotiate prices with the seller of raw milk. Such regulation could encourage an increase

of the prices of raw milk and milk products. Such regulation also could prevent the lowering of the prices of milk products in supermarkets.

Additionally, we may note the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk does not provide any argument why buyers of the milk are prohibited to lower the purchase price of milk products for more than 3% exactly. It is not clear why such a percentage is established.

5. Key enforcement decisions and case law

There have been five infringement cases initiated by the Lithuanian Competition Council since the adoption of the Law on the Prohibition of Unfair Practices of Retailers, four of them ended with the infringement decisions issued by the Lithuanian Competition Council; one has been terminated due to the lack of evidence of the violation of the Law.

Table 1. Case law concerning application of the Law on the Prohibition of Unfair Practices of Retailers

CC Decision	Infringer	Infringed norms of the Law	Sanction	Appealed	Decision of first instance court (VAAT)	Decision of the Supreme Administrative Court
6.6.2012 No. 1S-74	PALINK	Article 3 Part 1 (5): to tie the prices of goods supplied to the retailer as well as the supply conditions to the supplier's prices of goods and supply conditions applied to third parties	1) Monetary fine EUR 104,263	Yes	Monetary fine imposed by the CC was reduced to EUR 81,094	Decision of VAAT remained unchanged.
22.1.2014 No. 1S-8/2014	MAXIMA LT	Article 3 Part 1 (7): to accept unsold food products, except for non-perishable packaged food products if they are safe, high-quality and at least 1/3 of time before their expiration date remains or they have no expiration date and there is a prior agreement in relation to their return	1) Monetary fine EUR 11,585	No		

Table 1 – continuation

CC Decision	Infringer	Infringed norms of the Law	Sanction	Appealed	Decision of first instance court (VAAT)	Decision of the Supreme Administrative Court
24.1.2014 No. 1S-11/2014	Rivona, Norfos mažmena	Article 3 Part 1: 2) to compensate for the lost or smaller-than-expected income of the retailer from the sale of goods received from the supplier; 7) to accept unsold food products, except for non-perishable packaged food products if they are safe, high-quality and at least 1/3 of time before their expiration date remains or they have no expiration date and there is a prior agreement in relation to their return	1) Monetary fine EUR 26,066 2) To stop unfair trading practices	Yes	Appeal was not successful	
18.9.2015 No. 1S-97/2015	RIMI LIETUVA	Article 3 Part 1: 8) to pay directly or indirectly a part of the costs of sales promotion carried out by the retailer or together with it or to compensate for such costs in any other way, except for the cases where there is a written agreement between the retailer and the supplier regarding the amount of costs to be paid and sales promotion activities to be applied.	1) Monetary fine EUR 73,000 2) To stop unfair trading practices which were found during the investigation	Yes	Fine imposed by Competition Council was reduced to EUR 35 000 by the Court (VAAT)	The decision of VAAT was changed – the monetary fine was annulled due to infringement of legitimate interests of the retailer. The order to terminate the unfair practice has remained unchanged.

Source: this table was prepared by the authors based on case law.

All infringement proceedings have been initiated by the Lithuanian Competition Council itself, that is no suppliers or associations representing their interests have officially applied to the authority for the infringement proceedings initiation. Main reason for such a passive behaviour of the

suppliers has been identified as the fear of the suppliers for the negative consequences from the retailers due to the application to the authority. Considering that the amendments to the Law on the Prohibition of Unfair Practices of Retailers have been initiated and since 1 May 2016 the identity of the supplier having submitted the complaint regarding the alleged infringement of the Law shall not be disclosed based on the motivated request. Nevertheless, within the period of 2016–2017 as well as in 2018 no new infringement proceedings have been initiated both by the suppliers or associations and the Lithuanian Competition Council itself.[27] The Competition Council has recently proposed to amend the Law by ensuring that the identity of the supplier who submitted the application should be protected from disclosure without any motivated request.

III. Nature of infringement and scope of public enforcement

1. Nature of prohibited practices

Article 1 of the Law on the Prohibition of Unfair Practices of Retailers provides that the purpose of this Law shall be to limit the use of market power by retailers having significant market power and to ensure the balance of interests between suppliers and retailers having significant market power. Therefore, the main goal is the protection of the suppliers from potentially negative actions of the retailers.

2. Subjective scope of enforcement

The Law on the Prohibition of Unfair Practices of Retailers established the list of prohibited practices.

The Article 3(1) of the present Law provides that retailers shall be prohibited from carrying out any actions contrary to fair business practices when the operational risk of the retailers is transferred to suppliers or additional obligations on suppliers are imposed, or when the freedom of

[27] Certificate No. 8D-1 of Monitoring of Implementation of the Law on the Prohibition of Unfair Practices of Retailers issued by the Lithuanian Competition Council dated 29 May 2018, point 12. Retrieved from: http://kt.gov.lt/uploads/documents/files/veiklos-sritys/mazmenine-prekybs/pazymos/MPINVDI_stebesenospazyma_18-05-29.pdf (last visited on 10.10.2018).

suppliers to operate is limited and such additional obligations are imposed as requirements on the suppliers:

1) to pay directly or indirectly or remunerate in any other way for consent to start trading in the supplier's goods ("entry" fees);
2) to compensate the lost or smaller-than-expected income of the retailer from the sale of goods received from the supplier;
3) to compensate for the operational costs of the retailer related to equipping new stores or renovating the old ones;
4) to acquire goods, services or assets from third parties specified by the retailer;
5) to tie the prices of goods supplied to the retailer as well as the supply conditions to the supplier's prices of goods and supply conditions applied to third parties;
6) to change the basic supply procedures or specifications of the goods without notifying the supplier thereof within the time limit specified in the agreement, which may not be shorter than ten days;
7) to accept unsold food products, except for non-perishable packed food products, if they are safe, high-quality and at least 1/3 of time before their expiration date remains or they have no expiration date and there is a prior agreement in relation to their return;
8) to pay directly or indirectly part of the costs of sales promotion carried out by the retailer or together with it or compensate such costs in any other way, except such cases when there is a written agreement between the retailer and the supplier regarding the amount of costs to be paid and sales promotion activities to be applied;
9) to compensate expenses incurred while investigating consumer complaints, except for the cases where a justified consumer complaint was due to the circumstances which are the responsibility of the supplier. In this case, the real expenses of the retailer must prove the amount of expenses, which the retailer requests the supplier to compensate;
10) to pay directly or indirectly or to compensate in any other way for the arrangement of goods, except for the cases where there is a written agreement between the retailer and the supplier regarding payment for the arrangement of goods.

Article 3(2) of the Law on the Prohibition of Unfair Practices of Retailers additionally provides that where a supplier establishes in the agreement a commercial rebate expressed as a fixed amount of money, which is not tied to the sale, quality, logistics (distribution and delivery of goods), sales promotion and/or other conditions of purchase and sale of the goods and

where a retailer requests to accept the unsold food products (acceptance of which is not prohibited under point 7 of this paragraph), for which the commercial rebate on such products expressed as a fixed amount of money has already been received, the retailer shall be prohibited from refusing to return to the supplier the share of the commercial rebate, expressed as a fixed amount of money, in proportion to the returned food products.

The Article 3(3) of the Law on the Prohibition of Unfair Practices of Retailers also distributes the burden of proof that has to be followed during investigation of infringements of the Law. The duty to prove that the agreement referred to in points 7, 8 and 10 of paragraph 1 of this Article has been concluded and meets the set requirements shall fall on the retailer, which has concluded such an agreement.

3. Conditions for the application of the law

According to the Article 1 of the Law on the Prohibition of Unfair Practices of Retailers the present law is specifically applicable towards retailers who have a "significant market power".

Article 2 of the Law on the Prohibition of Unfair Practices of Retailers provides that "retailer having significant market power" (hereinafter retailer) means an undertaking engaged in retail trade in non-specialised stores with food, beverages and tobacco products predominating which alone or together with associated undertakings engaged in the same activity meets all of the following requirements:

1) the sales area of at least 20 stores from all the stores under its/their management in the Republic of Lithuania is not less than 400 m^2;
2) its/their aggregate income in the last financial year is not less than EUR 116 million; where a retailer is a foreign undertaking, the aggregate income shall be calculated as the total amount of income received in the Republic of Lithuania.

Therefore, the Law on the Prohibition of Unfair Practices of Retailers is applicable towards the retailers who satisfy two above-mentioned conditions concerning the sales area of the stores and turnover. In case above-mentioned conditions are satisfied, it is possible to make a conclusion that specific retailer has a significant marker power.

Currently in the Republic of Lithuania, the Competition Council officially recognized that there are five retail chains that correspond to the criteria under the Law on the Prohibition of Unfair Practices of Retailers, i.e.:

Maxima, Iki, Norfa, Rimi and Lidl. Therefore, from the practical point there is no reason for an ambiguity concerning the list of the undertakings that could be recognized as a "retailer having significant market power".

4. Economic agents covered by the law (*ratione personae*)

As mentioned, the Article 1 of the Law on the Prohibition of Unfair Practices of Retailers provides that the Law is applicable to retailers having significant market power and suppliers. We have explained above the meaning of the concept of a "retailer having significant market power". The present law aims to ensure essentially the protection of the supplier from any potential abuses from the retailers having significant market power. Moreover, the Law on the Prohibition of Unfair Practices of Retailers describes the concept of the "supplier" in quite a narrow way as a "food and beverage supplier". In this case "food and beverage supplier" ("a supplier") means a person selling food and/or beverages intended for sale to consumers to a retailer under a wholesale sale and purchase agreement.

It should be noted that in some cases the suppliers, which have a big turnover, or a well-established brand could have the ability to resist the "bargaining power" of the retailers. In some cases, the retailers may depend on the suppliers' consent to provide their goods to the specific retailer. It is especially important in case consumers have a specific preference to certain goods or the supplier represents a certain brand, which is well known in the relevant market. It seems that bearing in mind above-mentioned arguments the Parliament of the Republic of Lithuania on 17 December 2015 passed the new wording of the Law on the Prohibition of Unfair Practices of Retailers, which came into force from 1 May 2016. By the present amendment, the Parliament decided to modify Article 1(3) of the Law on the Prohibition of Unfair Practices of Retailers. After the amendment, Article 1(3) provides that the present Law shall not apply to relations between retailers having significant market power and suppliers whose aggregate income during the last financial year exceeds EUR 40 million. We believe that such amendment makes the Law on the Prohibition of Unfair Practices of Retailers more balanced.

IV. Public enforcement institution and proceedings

1. Institution in charge of public enforcement

The Law on Competition empowers the Lithuanian Competition Council to supervise the behaviour of retail chains in terms of the competition law and unfair trade practices including the supervision of the dominant undertakings. There is a rebuttable presumption of dominance of a retail chain in case its market share exceeds 30% under the Law on Competition.

In addition, the Law on the Prohibition of Unfair Practices of Retailers empowers the Lithuanian Competition Council to supervise the compliance of the behaviour of retail chains having significant market power with the said Law. The Lithuanian Competition Council has been selected as the most appropriate authority due to its competence and experience of supervision in the field of unfair competition (trade) and competition,[28] also considering the resources. It is noteworthy to mention that before the adoption of the Law on the Prohibition of Unfair Practices of Retailers in 2009, the Lithuanian Competition Council raised both general doubts about the necessity of the special Law regulating the relationship between the suppliers and retailers holding a significant market power and the authorisation of the Competition Council for supervision of the implementation of this Law. According to the Competition Council, its duty was to protect fair competition, that is competition among companies for clients/consumers in terms of prices and quality, whereas the Law regulating the food market would protect not competition or consumers but individual suppliers who would not necessarily operate efficiently.[29] Nevertheless, the Parliament of the Republic of Lithuania did not see that as a threat and tapped the Lithuanian Competition Council as the most appropriate authority to supervise the Law.

Following the Law, the Lithuanian Competition Council has the power to:

(i) supervise how retailers meet the requirements of the Law;
(ii) carry out an infringement investigation, examine cases with regard to infringement of the Law and apply sanctions provided for in the Law;
(iii) carry out monitoring of the Law and submit a report on the monitoring of the implementation of this Law to a Government-appointed institution which coordinates the monitoring of legal regulation;

[28] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/TAIS.321868 (last visited on 1.10.2018).
[29] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.356136 (last visited on 1.10.2018).

(iv) conduct unplanned inspections of the agreements between retailers and suppliers in accordance with the procedure laid down by the Lithuanian Competition Council and furnish the results of such examinations together with the report on the monitoring of the Law to the Government-appointed institution which coordinates the monitoring of legal regulation; following the Working Regulation of the Lithuanian Competition Council the unplanned inspections of the agreements shall be performed after the investigation procedure has been initiated in accordance with the Law;
(v) perform other functions set out under the Law.

When performing the functions set out in the Law, the Lithuanian Competition Council has the right to give obligatory instructions to retailers, suppliers, other persons and public authorities to submit documents, including documents containing commercial secrets, as well as other information required for performance of its functions set out in the Law. Also, the authority shall be entitled to interview persons related to investigated actions of the retailers, obtain written statements from such persons; to invite them to provide explanations at the Competition Council. Nevertheless, the Lithuanian Competition Council does not have the power to carry out unannounced inspections ("dawn-raids") of the suspected infringer's premises, vehicles, etc.; in other words, measures known and frequently used by the same authority in competition law infringement investigations. It is noteworthy to indicate that during the interviews for the purpose of monitoring of the Law for the years 2016–2017 there have been proposals of suppliers to entitle the Lithuanian Competition Council to carry out dawn-raids under the Law on the Prohibition of Unfair Practices of Retailers. However, the Lithuanian Competition Council has not upheld such a proposal by arguing that the inspections of the entities would cause restriction of privacy which is protected under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22 of the Constitution of the Republic of Lithuania and the monitoring for the period of 2016–2017 has not led to the conclusion that such additional authorisations of the Competition Council would be necessary and proportionate with the indicated protected values.[30]

[30] Certificate No. 8D-1 of Monitoring of Implementation of the Law on the Prohibition of Unfair Practices of Retailers issued by the Lithuanian Competition Council dated 29 May 2018, point 29. Retrieved from: http://kt.gov.lt/uploads/documents/files/veiklos-sritys/mazmenine-prekybs/pazymos/MPINVDI_stebesenospazyma_18-05-29.pdf (last visited on 1.10.2018).

With respect to the trade of raw milk and dairy products, the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Product empowers two separate authorities to carry out the supervision of the compliance with the respective regulation of the indicated Law and impose sanctions in case of the incompliance, namely:

(i) Agency for Development of Agricultural Business and Market and
(ii) State Agency of Food and Veterinary.

Both authorities shall be entitled to receive information and documents necessary for the investigation of the infringements of the indicated Law from the respective persons, also to perform the inspection of the premises related to the infringement and interview the persons related to the infringement. In case of an infringement, the authorities shall be entitled to impose sanctions. In addition, the monitoring of the implementation of the Law shall be performed by the Agency for Development of Agricultural Business and Market on yearly basis.

1.1. Practice of infringement investigations under the Law on the Prohibition of Unfair Practices of Retailers

The current case law regarding infringements under the Law on the Prohibition of Unfair Practices of Retailers is summarized in Section II Part 4 of this report.

1.2. Practice of monitoring of the Law on the Prohibition of Unfair Practices of Retailers

Following the Law on the Prohibition of Unfair Practices of Retailers the monitoring and reporting shall be performed every two years (until the amendment of the Law effective since 1 May 2016 the monitoring has been performed each year). In practice, there have been 7 reports on the implementation of the Law.

The last report was issued in May 2018 for the years 2016–2017 and concerned five major retail chains in Lithuania which met the requirements under the Law, i.e. MAXIMA, IKI, RIMI, NORFA and since 2017 LIDL (Competition Council of Lithuania, 2018, point 15). For the purpose of monitoring, questionnaires had been sent both to the indicated retailers and 188 suppliers of food and beverages. All the retailers and 153 suppliers submitted responses to the questionnaires (Competition Council of Lithuania,

2018, points 16–17). More than 60% of the suppliers and retailers indicated that the regulation under the Law is sufficient and efficient and ensures the balance of interests between suppliers and retailers. An even higher percentage of the interviewed suppliers and retailers (more than 80%) indicated that the authorisations of the Lithuanian Competition Council ensure the efficiency of the implementation of the Law (Competition Council of Lithuania, 2018, points 22–31). However, more than 40% of suppliers indicated that monitoring is not necessary and has no added value as the reports for monitoring do not reflect the real situation as most suppliers do not dare to submit their opinion reflecting the factual situation due to fear of negative consequences (Competition Council of Lithuania, 2018, point 35).

2. Type and principles of proceedings

2.1. Proceedings under the Law on Competition

The Law on Competition and the related acts establish the principles, procedures and terms for the investigation of the alleged abuse of dominance and other competition law infringements of the retailers.

2.2. Proceedings under the Law on the Prohibition of Unfair Practices of Retailers

The Law on the Prohibition of Unfair Practices of Retailers establishes the principles, procedure and terms for the administrative proceedings for the examination of the alleged infringements of the Law and establishing the infringement.

As already indicated above, the infringement proceedings may be initiated both (i) based on the application of the suppliers whose interests have been violated and of the associations representing the interests of the suppliers and (ii) on the own initiative of the Lithuanian Competition Council by adopting a reasoned resolution (Article 6 of the Law). In case the supplier, together with the application for the Lithuanian Competition Council, has lodged a reasoned request regarding its identity protection, it shall be deemed that the investigation of the infringement has been opened on the initiative of the Competition Council.

The application to open an investigation must be submitted in writing to the Lithuanian Competition Council and must comply with the formal requirements indicated in Article 8 of the Law on the Prohibition of

Unfair Practices of Retailers including submission of the documents and other evidence substantiating the allegations of the infringement. Having received the application, the Competition Council must examine it and adopt a reasoned resolution to open an investigation of an infringement or to refuse to open the investigation not later than within 30 days from the receipt of the application meeting the requirements under the Law. According to publicly available information, there had been no applications within the period of 2016–2018. The main reason for such inactivity is the fear of reprisals by the retail chains against the applicants. There is a proposal pending in the Lithuanian Parliament to introduce the liability of the retail chains for any punitive actions and consequently to encourage suppliers to apply to the Lithuanian Competition Council with complaints.[31]

The Law established six grounds for a refusal to open an infringement, namely:

(i) the investigation of the infringement specified in the application is outside the competence of the Competition Council;
(ii) the facts specified in the application have already been investigated and a resolution of the Competition Council has already been adopted on the issue or there is an effective decision of the court;
(iii) there are no factual data which would allow to reasonably suspect that the Law has been infringed;
(iv) the application does not meet the requirements specified in the Law and the applicant fails to eliminate the specified shortcomings within the time limit set out by the Competition Council;
(v) the actions contested in the application are complete and neither single nor continuous, and of minor significance due to their nature, duration, scope or other specific features;
(vi) more than one year has passed since the date of the infringement until the date of the receipt of the application meeting the requirements under the Law, and where the infringement is single or continuous, more than one year has passed since the date of awareness of the infringement.

The decision to refuse to open an infringement investigation shall be published on the website of the Lithuanian Competition Council not later than within three working days from its adoption and a copy of the resolution shall be forwarded to the applicant. Upon a decision to open an investigation, both the applicant and the retailer suspected of having

[31] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/847f1780f47611e8b5e8d681eb86525b?jfwid=axl7zd0g4 (last visited on 10.01.2019).

infringed the Law shall be forwarded with a copy of such a decision within the terms specified under the Law.

The administrative proceedings of the Lithuanian Competition Council related to the infringement consist of two parts:

(i) the investigation carried out by the authorised investigators of the authority;
(ii) hearing of the case by the Lithuanian Competition Council.

Following the Law, the proceedings shall last up to 9 months in total; hence, quite strict time limits are set out in the Law during the proceedings. There is a proposal to amend the Law at the Lithuanian Parliament by extending the maximum term up to 18 months due to expected higher number of investigation procedures under the Law and higher amount of material due to the proposals to establish additional safeguards and incentives to start the investigations and broadening the competence and authorisations of the Lithuanian Competition Council during the investigation.[32]

Once the investigation has started, the retailer suspected of having infringed the Law shall be entitled to submit a reasoned explanation regarding the circumstances as well as the supporting evidence within a time limit specified by the Competition Council (not less than 14 days from the receipt of the letter of the Competition Council). Having received the explanation, the authority may decide to terminate the investigation on the same grounds as for a refusal to open the investigation or shall continue the investigation.

The investigation shall be completed by issuing a statement of objection by the authority which shall be forwarded to the parties to the proceedings. The parties shall be entitled to provide their written explanations concerning the statement of objection within the time limit set by the authority which in most cases shall be 14 days. In addition, upon completion of the investigation the parties to the proceedings shall also be entitled to get access to the case material, with the exception of the documents which constitute a state, official, commercial or professional secret. In order to access the documents containing a professional or commercial secret, the consent of the person whose documents containing professional or commercial secrets are sought to be accessed must be obtained.

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[32] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/847f1780f47611e8b5e8d681eb86525b?jfwid=axl7zd0g4, (last visited on 10.01.2019).

The hearing of the case as the second part of the administrative proceedings under the Law shall start not earlier than 21 days after the statement of objection have been issued to the parties to the proceedings. The hearing of the case by the decision of the authority shall be in oral or written form (in the latter case the parties to the proceedings shall not be invited to the hearing). When examining a case in the oral proceedings, the Competition Council may, on its own initiative or at the request of the parties in the proceedings, declare the hearing or a part thereof to be closed, where this is necessary with a view to protecting a state, official, professional or commercial secret.

Upon completion of the examination of the case, the Lithuanian Competition Council shall adopt one of the following decisions (in the form of a resolution):

(i) to impose the sanctions under the Law, if the infringement of the Law has been established;
(ii) to terminate the examination of the case if no infringement of the Law has been established;
(iii) to defer the examination of the case and to carry out additional investigation of the infringement if new circumstances which are relevant for the hearing arise or become known.

Decisions indicated in points (i) and (ii) must be adopted not later than within two years from the commitment of the infringement, and where the infringement is single or continuous – from the date of awareness of the infringement. All the decisions (excluding the sensitive content thereof) shall be published on the website of the Competition Council and shall be forwarded to the parties to the proceedings.

Decisions of the Lithuanian Competition Council (i) to refuse to open an investigation; (ii) to terminate the investigation or the case as well as (iii) decisions to impose sanctions may be appealed against to the administrative court within 30 days from the adoption thereof. The appeal shall be heard by Vilnius Regional Administrative Court as the court of first instance. The decision of the indicated court may further be appealed to the Supreme Administrative Court of Lithuania whose decision whereof is final and enforceable.

2.3. Proceedings under the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Product

The Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Product regulates the main proceedings of the establishment of the infringement under the indicated Law.

The infringement proceedings may be initiated by (i) business entities; (ii) state and municipal institutions and authorities; (iii) associations representing business entities based on the written application. The authority shall refuse to examine the application only in three cases:

(i) the investigation of the infringement specified in the application is outside the competence of the authority;
(ii) the facts specified in the application have already been investigated and a resolution of the authority has already been adopted on the issue;
(iii) more than one year has passed since the date of the infringement, and where the infringement is continuous – more than one year has passed since the last actions of the infringement.

The authority shall adopt its decision regarding the alleged infringement within 30 working days period from the receipt of the application meeting the requirements under the Law (with a possibility to extend the term for an additional term of 1 month). The authority shall adopt one of the following decisions – to establish the infringement and impose sanctions or to terminate the examination of the application due to the absence of the infringement. The decisions of the authority may be further appealed before administrative courts.

3. Fines and other sanctions

3.1. Sanctions under the Law on Competition

In case of abuse of dominance by the undertaking the Law on Competition establishes the following sanctions for the infringement:

(i) a fine of up to 10% of the gross annual income in the preceding business year;
(ii) obligation to terminate illegal activity, to perform actions restoring the previous situation or eliminating the consequences of the violation, including the obligation to terminate, amend or conclude contracts, also

to set the time limits and conditions for meeting the above obligations; if the undertaking fails to comply with the above-indicated obligation a fine of up to five percent of the average gross daily income in the preceding business year may be imposed on undertakings for each day of commitment (continuation) of a violation.

Furthermore, a personal administrative liability (disqualification and monetary fines) may be imposed to the head of the company having abused the dominant position.

In case of a procedural infringement during the investigation, a fine of up to one percent of the gross annual income in the preceding business year may be imposed on undertakings (e.g. for not providing information required for carrying out the investigation, also for providing incorrect and incomplete information, for hindering the officials of the Competition Council from carrying out inspections of premises, territory and means of transport of the undertakings, etc.).

The Law on Competition and Governmental legal act establish the rules for the calculation and determination of the above-indicated fines.

3.2. Sanctions under the Law on the Prohibition of Unfair Practices of Retailers

Following the effective Law on the Prohibition of Unfair Practices of Retailers (Article 12), in case the prohibited unfair practices under Article 3(1) and (2) of the indicated Law are established by the Lithuanian Competition Council the following sanctions shall be imposed to the retailers to which the requirements under the indicated Law apply:

(i) a fine up to EUR 120,000 and
(ii) additionally, the retailer may be obliged to terminate the unfair practices defined in this Law or an obligation to perform actions restoring the previous situation or eliminating the consequences of the infringement, including amendment of the agreement.

The initial amount of the above-indicated fine was insignificantly lower when the Law was adopted in 2009 and after the amounts have been converted into euros in 2015 the amounts have been round-up to a slightly higher amount for mostly convenience purposes.[33]

[33] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/d4bbbe50397811e4a343f25bd52b4862 (last visited on 1.10.2018).

It is worthy to note that while adopting the Law, there had been proposals to tie the amount of the fine with the turnover of the preceding financial year of the infringer, however, these proposals were dismissed, and the fixed maximum amount of the fine was set out in the Law.[34]

In case the retailer fails to comply or fails to comply in a timely manner with the obligations of the Lithuanian Competition Council to terminate the prohibited unfair practices, to perform actions restoring the previous situation or eliminating the consequences of the infringement, a periodic fine of EUR 300 shall be imposed on retailers for each day of the continuation of the infringement.

Therefore, a general principle is that the fines and other sanctions shall be imposed on the retailers (and their related wholesalers considered as a single economic unit under the Law as in NORFA/RIVONA case (see Table 1 in Section II Part 4) in case of infringement of the Law on the Prohibition of Unfair Practices of Retailers. Nevertheless, for the purpose of proper implementation of the competence of the Lithuanian Competition Council to safeguard the values under the indicated Law the sanctions for the procedural infringements might be imposed not only on the retailers, but also on the suppliers or other persons in case they do not follow the procedural requests of the Lithuanian Competition Council. Namely, the following sanctions shall be imposed on retailers, suppliers or other persons for the failure to comply with the procedures under the Law on the Prohibition of Unfair Practices of Retailers:

(i) a fine of up to EUR 10,000 for not providing information required for carrying out an investigation of an infringement, also for providing incorrect or incomplete information;
(ii) a periodic fine of EUR 300 shall be imposed for each day of non-compliance in a timely manner with the instructions of the Lithuanian Competition Council to provide information.

The Lithuanian Competition Council may not itself impose a lower fine than the above-indicated fines. However, the Law allows the court hearing the complaint concerning the infringement decision of the Lithuanian Competition Council, to reduce the fine by considering mitigating and other circumstances (due to which a respective fine would be too large because it would be disproportionate to the committed infringement and therefore unfair) and acting in compliance with the criteria of fairness and reasonableness.

[34] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.358356 (last visited on 1.10.2018).

The Law on the Prohibition of Unfair Practices of Retailers establishes the criteria for the establishing the above indicated fines. Firstly, the amount of the fine imposed by the Lithuanian Competition Council shall depend on (i) the nature of an infringement, (ii) its duration and (iii) scope as well as (iv) mitigating and aggravating circumstances (Article 12 (5)).

Neither the Law nor other legal acts define or establish more detailed and specific rules with respect to the calculation of the fine in terms of the nature of infringement (e.g. which infringements would be regarded as more severe and consequently a higher fine should be calculated), duration of the infringement (e.g. if an infringement lasts less than half a year) or its scope. The Law only establishes which of the circumstances shall be regarded as mitigating or aggravating the liability of retailers, suppliers or other persons who have committed an infringement (Article 12 (7) and 12 (8)) (see Table 2).

Table 2. Mitigating and aggravating circumstances

Mitigating circumstances	Aggravating circumstances
(i) actions to voluntarily prevent the harmful consequences of the infringement; (ii) actions to provide assistance to the Lithuanian Competition Council during the investigation; (iii) actions to compensate for losses or eliminate the damage incurred.	(i) actions impeding the investigation; (ii) continuing the infringement despite the obligation to terminate it; (iii) where damage has been caused; (iv) the infringement is repeated within one year from the imposition of the fine specified in this Law.

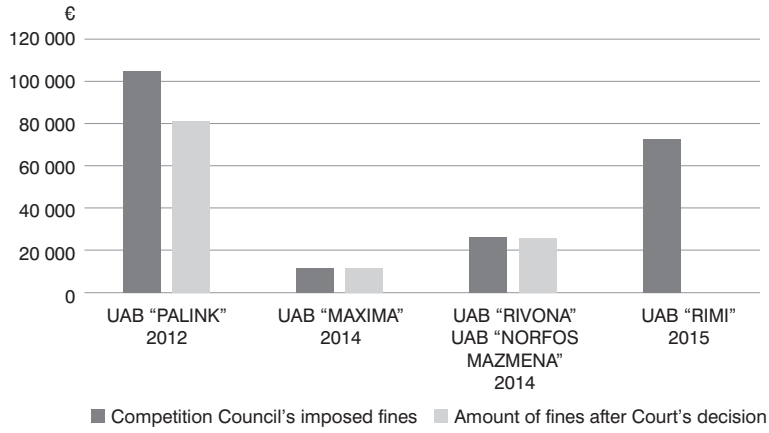
However, the Law does not specify how the mitigating or aggravating circumstances should be considered while determining the fine for the infringement.

All the criteria are interpreted in the case-law of the Competition Council and courts. As mentioned above, in practice there have been four out of five cases initiated by the Lithuanian Competition Council which ended with the fines imposed on retailers. None of them was imposed with the maximum amount of the monetary fine, only in one case the amount of the fine imposed by the Competition Council has been higher than EUR 100,000 considering the long duration of the infringement (almost 2 years) and a large scope due to a significant number of suppliers affected (see Table 3). Almost all of the infringement decisions have been appealed by the retailers.

In the most recent case, the Supreme Administrative Court of Lithuania abolished the fine imposed on UAB RIMI LIETUVA despite the fact that the Supreme Administrative Court of Lithuania confirmed the position

of the Lithuanian Competition Council that the infringement of the Law on the Prohibition of Unfair Practices of Retailers was established and should be terminated by the infringer. By its ruling of 27 September 2017, the Supreme Administrative Court of Lithuania stressed that the Lithuanian Competition Council reviewed the agreements inter alia of the infringer for the purpose of the monitoring of the Law and indicated that no incompliance with the said Law has been found. Therefore, based on the legitimate expectations of the infringer in the particular situation, also principles of justice, reasonableness and proportionality as well as jurisprudence of the Constitutional Court the Supreme Administrative Court abolished the imposed fine.[35]

Table 3. Statistics of the fines imposed under Law on the Prohibition of Unfair Practices of Retailers



Source: database of the Lithuanian Competition Council.[36]

There have been no practice and case law in Lithuania regarding imposition of the procedural fines under the Law on the Prohibition of Unfair Practices of Retailers.[37]

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35 Decision of the Supreme Administrative Court of 17 September 2017, case No. eA-1537-858/2017, http://kt.gov.lt/lt/dokumentai/teismo-sprendimas/id.367 (last visited on 1.10.2018).

36 See: http://kt.gov.lt/lt/dokumentai/mazmenine-prekyba (last visited on 1.10.2018).

37 However, in practice the Competition Council has imposed and the courts partially upheld severe fines for the failure to comply with the instructions of the Council, e.g. to provide documents for the competition law related infringement investigation (the fine of 20,000 EUR has been imposed in *Plunges duona* case, see: http://kt.gov.lt/lt/dokumentai/teismo-sprendimas/id.286 (last visited on 1.10.2018).

The fine imposed by the Lithuanian Competition Council shall be paid by the infringer to the state budget. The infringer has a duty to pay the imposed fine not later than within three months from the receipt of the infringement decision under which the fine has been imposed. In the event of appealing against such an infringement decision, the duty to pay the fine shall be suspended without any negative consequences (e.g. interest) until a final court decision dismissing the appeal comes into effect. In that case the fine shall be paid not later than within one month from the coming into effect of the final court decision.

In addition, at a reasoned request of the infringer, the Lithuanian Competition Council shall have the right to defer the payment of a fine or a part thereof for a period of up to six months, provided that the infringer is unable to pay the fine in time for objective reasons.

3.3. Sanctions under the Law on the Prohibition of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products

The Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products establishes the following sanctions in case of the infringement of the Law:

(i) warning or monetary fines to be imposed based on the principles of objectivity and proportionality (see Table 4);
(ii) order to terminate the unfair actions or to perform actions restoring the previous situation or eliminating the consequences of the infringement including the amendments of the raw milk sale-purchase agreement.

Table 4. Sanctions for the breach of the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products

Infringement type	Monetary fine
Substantive law infringement	
Article 3 Part 2(1): • unilaterally terminating sale and purchase agreement of raw milk without informing other party of the contract in a period of time agreed in the contract (this period cannot be shorter than 30 days)	Warning or monetary fine from EUR 100 to EUR 3,000
Article 3 Part 2(2): • Changing terms & conditions of raw milk sale and purchase agreement without informing other party of the contract in a period of time agreed in the contract (this period cannot be shorter than 30 days) unless the price of raw milk is being increased or the purchaser of raw milk is a cooperative company (and acknowledged as such by the law)	Monetary fine from EUR 600 to EUR 1,800

Infringement type	Monetary fine
Article 3 Part 3(1): • purchasing raw milk, which satisfy the quality criteria established by the order of Lithuania Republic Minister of Agriculture, from the same raw milk sellers group and presenting it to the raw milk purchaser in a same way (raw milk is delivered to raw milk purchase point, raw milk is taken straight from the farm, raw milk is delivered straight to raw milk processing company) applying different price of raw milk in raw milk sale and purchase agreements, except cases where raw milk is purchased from raw milk sellers who sell their own production milk and belong to milk producers organizations (acknowledged in order established by the Minister); however in this case lower price of raw milk cannot be applied if it goes lower then established by the groups of raw milk sellers	Monetary fine from EUR 1,500 to EUR 4,000
Article 3 Part 3(2): • not purchasing all raw milk quantity which was established in raw milk sale and purchase agreements between the purchaser and the seller who sells more than 500 kg raw milk per day with allowed 10% error from quantity, established in raw milk sale and purchase agreement	Monetary fine from EUR 2,500 to EUR 6,000
Article 3 Part 3(3): • lowering the purchase price of raw milk with no justified reason	Monetary fine from EUR 1,800 to EUR 4,500
Article 3 Part 3(4): • lowering the purchase price of raw milk more than two periods in the row of regularly selling raw milk (as described in Payment for agricultural production law)	
Article 4: • milk products, made in milk processing companies which operate in Lithuania and included in a list, approved by the order of Minister of Agriculture, supplied to Lithuanian market, must be marked in specific way by the order of Minister of Agriculture, indicating the origin country of raw milk	Monetary fine from EUR 2,000 to EUR 5,000
Article 5 Part 1: • in the event when raw milk purchaser is lowering raw milk purchase price, which was established in raw milk sale and purchase agreement, more than 3 percentage points, the purchaser must justify this lowering of price and submit this justification to Market regulation agency	
Procedural infringement	
Article 11 Part 8: the untimely execution of order by the institution of control to supply the information	Monetary fine of EUR 150 for every day delayed to submit information
Article 11 Part 9: • the untimely execution or absence of execution of orders by the institution of control to discontinue prohibited unfair actions or to commit actions which would restore previous position or eliminate the consequences of the infringement	Monetary fine of EUR 200 for every day of (continuous) infringement

Source: database of the Lithuanian Parliament.[38]

[38] See: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/11893812200c11e585eaba374ef4b409/MolTyfBLfh?positionInSearchResults=0&searchModelUUID=62d1c350-566a-4e8d-bea2-6770b6214eca, (last visited on 1.10.2018)

The Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products establishes analogous criteria for the establishing the above indicated fines as under the Law on the Prohibition of Unfair Practices of Retailers (the nature of an infringement, its duration and scope as well as mitigating and aggravating circumstances which are similar as under the indicated Law, in addition, other circumstances might be regarded as mitigating or aggravating by the authorities themselves). In addition, the Law on the Prohibition of Unfair Activities of Business Entities Buying-Selling Raw Milk and Trading in Dairy Products establishes that the monetary fine should be lower than the average of the fine for the infringement in case of the mitigating circumstances and should be higher than the average – in case of aggravating circumstances.

According to the information provided by the Agency, out of 159 investigations initiated by the Agency in 2016, 9 raw milk buyers were found acting against the indicated Law, while in 2015 – 10. In 2017 the percentage of infringements rose: out of 136 investigations, 15 raw milk buyers were found to have infringed the Law. However, there is no court practice under the indicated Law.

The fine imposed by the authority shall be paid by the infringer to the state budget not later than within three months from the receipt of the infringement decision under which the fine has been imposed. In the event of appealing against such an infringement decision, the duty to pay the fine shall be suspended without any negative consequences (e.g. interest) until a final court decision dismissing the appeal comes into effect. In that case the fine shall be paid not later than within one month from the coming into effect of the final court decision.

3.4. Other sanctions

The Law on Paying-Off for the Agricultural Products establishes an obligation of the buyer of the agricultural products to pay default interest set out under the Law in case of the late payment to the seller of agricultural products as well as compensation of the related costs.

Furthermore, the Code of Administrative Offenses establishes a personal administrative liability (monetary fines) of the head of the buyer of agricultural products, e.g. for non-compliance with the written form requirement of agricultural production sale and purchase agreement or setting worse payment conditions in agricultural production sale and purchase agreements than established in law and other legal acts (Article 178), for the overdue payment for agricultural production, etc.

V. Conclusions

The Law on the Prohibition of Unfair Practices of Retailers is the main legal act which prohibits the abuse of bargaining power of retailers towards the suppliers. The purpose of the Law on the Prohibition of Unfair Practices of Retailers was to limit the use of market power exercised by the major retailers and ensure a balance of interests in relation to food and beverage suppliers. The Republic of Lithuania was the first country among the Baltic States (Lithuania, Latvia and Estonia) that passed a specific law for the prohibition of unfair actions of retailers. The Law on the Prohibition of Unfair Practices of Retailers provides that the Law is applicable towards the retailers having significant market power and suppliers. The present law aims to ensure essentially the protection of the supplier from any potential abuses from the retailers having significant market power. Moreover, the Law on the Prohibition of Unfair Practices of Retailers describes the concept of the "supplier" in quite a narrow way as a "food and beverage supplier". In this case "food and beverage supplier" ("a supplier") means a person selling food and/or beverages intended for sale to consumers to a retailer under a wholesale sale and purchase agreement.

The current legislation is not sufficient to tackle the problems raised by the interested parties during the monitoring of the Law on the Prohibition of Unfair Practices of Retailers concerning the unfair practices of certain retail chains. Main reasons for that is the lack of applications to start the investigations due to suppliers' fear of reprisals by the retail chains, subsequently a low number of investigations and quite limited authorizations of the Lithuanian Competition Council which lead to a lower number of the infringement decisions under the indicated Law. Hence, there are initiatives in the Lithuanian Parliament to amend the Law by broadening the authorisations of the Lithuanian Competition Council, by establishing the liability of the retail chains for the responsive actions against suppliers and by introducing other incentives to improve the effectiveness of the Law. Those initiatives if adopted might solve certain obstacles for a more efficient implementation of the Law. However, these changes will highly depend on how successfully the Lithuanian Competition Council will be in implementing the current and new tools under the law.

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POLAND

I. Introduction

1. Food supply chain in Poland

The role of the food supply chain in the Polish economy appears unquestionable if we take into account the Poland's good position among the largest food producers and exporters in the European Union (Drelichowski and Sikora, 2017, p. 7). The task of making the assessment of the food supply chain in Poland must begin with a general remark that all parts of this food supply chain are characterised by a relatively low level of concentration, even though economic changes leading to an increase in the level of concentration can be observed in recent years (OECD, 2014, p. 17, 303), in particular in food retailing.

The first part of the food supply chain in Poland, agricultural production, is characterised by considerable fragmentation. According to the Statistics Poland (Główny Urząd Statystyczny, GUS), in 2016, Polish farmers were owners of farms having 10.31 hectares on average, over 30% smaller than

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an average EU farm (Główny Urząd Statystyczny, 2017a, p. 62). The overall number of farms was 1,410,700, showing a general decreasing tendency across time (Główny Urząd Statystyczny, 2017a, p. 61). Virtually all (99.7%) were individual farms, mainly family-owned (Główny Urząd Statystyczny, 2017a, p. 61). It is considered that when joining the European Union in 2004, Poland brought a lot of predominantly poor farmers into the Union (Swinnen, 2018, p. 104). One of the problems of Polish farmers is their low bargaining power; if they established larger producer groups, they would be able to negotiate more effectively with large buyers to obtain better prices (UOKiK, 2018c; UOKiK, 2018f).

The situation in the next part of the chain, food processing, varies between segments but most food processing industries in Poland are characterised by a relatively low level of concentration (OECD, 2014, p. 303), compared to other European national markets. Taking into account the characteristics of food processing (high labour intensity, strong links to the local market, significant product variety, short-run production), it seems that concentration and consolidation processes are not going to cover all food processing industries and there will always be a significant number of SMEs (small and medium-sized enterprises) in the Polish market (Polska Agencja Informacji i Inwestycji Zagranicznych S.A., 2013, p. 11). However, the food processing sector is already marked by a strong presence of international corporations that produce over 40% of the production volume, sell under their own well recognized brands and often use their own wholesale distribution channels to reach the small grocery stores (Chechelski, 2013, p. 13).

The food distribution sector (the food wholesale and retail industries) is also relatively de-concentrated on the national level and characterised by high intensity of competition (OECD, 2014, p. 17, 303). The modern food retail industry began to take its shape after the year 1989 when the transformation of centrally planned economy into market economy took place. The transformation enabled the entry of foreign operators into the Polish market. The overall number of food retail outlets in Poland remains relatively stable since 2005 (OECD, 2014, p. 303). However, an average 5-firm sales concentration ratio (CR5) in food retailing which has been reported as scarcely around 20% for 2004–2007 (OECD, 2014, p. 18; Sheldon, 2018, p. 53), has risen to moderate 48.7% in Polish store-based grocery retail in 2016 (European Commission, 2018, p. 109).[1]

[1] Compared to eg 94.6% in Finland. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018SC0093 (all Internet references in this Article were last visited on 14 December 2018).

Moreover, the structure of food retail outlets is being transformed. From 2005 until 2016, the share of large outlets (1,000 m^2 or more) has grown from 18.4% to 26.9%, while the share of the smallest stores (99 m^2 or less) has decreased from 61.0% to 43.9% (Główny Urząd Statystyczny, 2015, p. 41; Główny Urząd Statystyczny, 2017b, p. 30). Competition in the retail food market can be seen mostly between international chains of modern format stores from the HSD segment (hypermarkets, supermarkets and discounters). The large format stores can be seen as accounting for over 60% of total packaged food sales in Poland (European Commission, 2018, p. 107). Among the largest retail chains are Jeronimo Martins ('Biedronka'), Schwarz ('Lidl', 'Kaufland'), Tesco, Eurocash ('ABC', 'Lewiatan'), Auchan, Carrefour, Intermarché. A further feature of food retailing in Poland is the growing importance of discounters, characterised by a more limited selection of products, lower prices compared to those in traditional retail stores and their own 'private labels' (OECD, 2014, p. 19). Furthermore, a growing trend is a tightened cooperation between a retail chain from the HSD segment and food processing companies, focusing on producing under a private label of the retailer, at the same time giving up or neglecting the development of the producer's own brands (OECD, 2014, p. 305). Food sales under private labels makes up around 20% of the total food sales in Poland (Kalus, 2018).

There are numerous factors, however, that may limit further expansion of modern retail outlets, such as a low level of urbanisation, relatively low income level, high level of self-provision by farmers, high level of fragmentation of food processing, difficulties in constructing new stores (limited access to suitable land parcels, administrative barriers) and consumer preferences (Chechelski, 2013, p. 12–13).

Even though the market available to traditional wholesalers still exists, it shrinks due to the increase of the share of the sales volume by HSD. There are also modern logistics centres competing with traditional wholesalers. This forces the latter to consolidate their operations or vertically integrate with a producer or with one of the smaller retail chains (OECD, 2014, p. 305).

It is also worth noting that short food supply chains can be viewed as not very popular in Poland. Of the types of short food supply chains encompassing direct sales by individual farmers, direct sales to purchasing groups and partnerships, direct sales to the end-consumer via direct local markets or food fairs have been preserved in Poland where there are over 2,000 local all-year and seasonal outdoor markets (Główny Urząd Statystyczny, 2017b, p. 35; see also Borowska, 2016, p. 51). According to

recent amendments to Polish laws that regulate direct sales, making them easier for farmers, this type of sales may be even revived and its level may increase. The rarity is still, however, operating of purchasing groups (Kawecka and Gębarowski, 2015, p. 461).

Unfair business conduct by operators wielding bargaining power in the food supply chain is a weighty challenge in Poland. The imbalance of bargaining power leads to unfair trading practices, such as unreasonable extension of payment periods or disproportionate allocation of risk in favour of the buyer. The negative effects usually occur downstream – buyers' unfair trading practices are harmful to suppliers, cascading backward in the chain to ultimately reach farmers. Unfair trading practices may also affect the market overall. Only the direct effect on consumers is questioned (denied in Explanatory Memorandum accompanying the draft of the EU directive,[2] p. 10–11; but see Explanatory Memorandum to the draft of the newly introduced Polish law,[3] p. 2).

2. Map of Polish laws

The rules against unfair trading practices in the food supply chain can be found in Polish public law as well as in private law.

The most significant piece of legislation is the Act on Counteracting Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products[4] (commonly known as the Anti-Power Act,[5] hereinafter APA). It was adopted on December 15, 2016 and entered into force in July 2017. The APA is a publicly enforced law, enforced by the President of UOKiK – the Polish competition authority (see section II.2 below).

It is important to note that on October 4, 2018, that is only 15 months after the entry into force of the APA, an amendment (hereinafter Amending Act) was adopted.[6] The Amending Act aims to introduce incentives to apply the APA by expanding the scope of application in favour of small traders

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2 UTPD, see section I.2.

3 APA, see section I.2.

4 Act of 15 December 2016 on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products [*Ustawa o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi*] (consolidated text Jornal of Laws of the Republic of Poland 2019, item 517).

5 In Polish *ustawa antyprzewagowa*.

6 Act of 4 October 2018 Amending the Act on Counteracting the Unfair Use of Contractual Advantage in the Trade in Agricultural and Food Products (Journal of Laws of the Republic of Poland 2018, item 2203).

(see section III.1 below). Further amendments are expected due to the EU's planned Unfair Trading Practices Directive aiming to counter on unfair trading practices in business-to-business relationships in the food supply chain[7] (hereinafter draft UTPD), which was announced by the European Commission in April 2018. The final scope of the amendments and the date of their adoption are still unknown because the legislative procedure in the EU is still ongoing.

Another publicly enforced Polish regulation is the 2007 Act on Competition and Consumer Protection (hereinafter CCPA).[8] The CCPA seeks to eliminate unfair trading practices in the food supply chain because of their anti-competitive character. However, only unfair trading practices of a trader with a dominant position in the relevant market may be prohibited under the CCPA as the abuse of a dominant position (see section II.2 below). Though, the APA is modelled on the CCPA provisions and the regulation contains numerous references to the CCPA, such as concerning the enforcement rules (see section IV.2 below).

Additionally, under the Act of 2017,[9] a newly created authority – the National Support Centre for Agriculture (Pol. *Krajowy Ośrodek Wsparcia Rolnictwa*, hereinafter KOWR) – supports the fair conduct in the food supply chain. KOWR carries out simultaneous inspections with UOKiK and examines compliance with the obligation of written supply contracts with farmers provided by the Act on the Organization of Certain Agricultural Markets[10] and the EU Regulation No. 1308/2013[11] (UOKiK, 2018c).

In Polish private law it is the Act on Combating Unfair Competition (hereinafter the CUCA) of 1993[12], which may be understood as a regulation equivalent to the publicly enforced APA. The CUCA is a regulation on

7 COM (2018) 173 final.

8 Act of 16 February 2007 on Competition and Consumer Protection [*Ustawa o ochronie konkurencji i konsumentów*] (consolidated text Journal of Laws of the Republic of Poland 2019, item 369).

9 Act of 10 February 2017 on the National Support Centre for Agriculture [*Ustawa o Krajowym Ośrodku Wsparcia Rolnictwa*] (consolidated text Journal of Laws of the Republic of Poland 2018, item 1154).

10 Act of 11 March 2004 on the Organization of Certain Agricultural Markets [*Ustawa o organizacji niektórych rynków rolnych*] (Journal of Laws of the Republic of Poland 2018, item 945).

11 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347, 20.12.2013, p. 671.

12 Act of 16 April 1993 on Combating Unfair Competition [*Ustawa o zwalczaniu nieuczciwej konkurencji*] (consolidated text Journal of Laws of the Republic of Poland 2018, item 419).

unfair competition in business-to-business (hereinafter B2B) relationships. Poland did not extend the rules on business-to-consumer (hereinafter B2C) unfair commercial practices based on the Unfair Commercial Practices Directive[13] to B2B relations. Therefore, the B2C and B2B unfairness is prohibited by two separate pieces of legislation – the UCPA and the CUCA, respectively. While the CUCA, unlike the APA, may be applied to vertical and horizontal relationships, the similarity of both acts is best seen in their general clauses that prohibit trading practices contrary to 'good practices' (see sections II.1 and III.3 below).

Unfair trading practices in the food supply chain can also be a case before a Polish civil court due to infringement of the Civil Code[14] or of the Act on Payment Periods in Trade Transactions[15] (see section II.1 below).

The main Polish regulation on unfair trading practices in the food supply chain – the APA is subject to vivid discussions in Poland. Thanks to some visible effects of the APA (such as publicly presented inspections which revealed irregularities in the food supply chain and several proceedings carried out by the President of UOKiK) the Polish government is able to present itself as protector of farmers and consumers. At the same time, the idea of a weaker party protection in the food supply chain has a broad social appeal as it is associated with consumer protection. So, the evolution of relevant legislation from privately (CUCA) to a supposedly more effective publicly enforced law (APA) is an important issue in the current political discourse. This is not surprising because the support of Polish farmers for the governing party is particularly important in the next general election in the autumn of 2019.

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13 Act of 23 August 2007 on the Protection against Unfair Commercial Practices [*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*] (consolidated text Journal of Laws of the Republic of Poland 2017, item 2070).

14 Act of 23 April 1964 Civil Code [*Ustawa Kodeks Cywilny*] (consolidated text Journal of Laws of the Republic of Poland 2018, item 1025 as amended).

15 Act of 8 March 2013 on Payment Periods in Trade Transactions [*Ustawa o terminach zapłaty w transakcjach handlowych*] (consolidated text Journal of Laws of the Republic Poland 2019, item 118).

II. Detailed description of Polish legislation

1. Privately enforced law

As already indicated, the CUCA is the leading privately enforced Polish legislation prohibiting unfair B2B practices. This regulation of 1993 complements the APA due to the convergent scope of application – the CUCA covers *inter alia* the unfair trading practices in the food supply chain. It is easy to see that the APA, adopted 23 years after the adoption of the CUCA, mirrors its approach and wording.

The CUCA contains a general clause prohibiting unfair trading practices, examples of prohibited practices and specific rules on civil liability.[16] It does not provide for any principles of proceedings because of a complex legal framework in the Polish Code of Civil Procedure.[17]

At the beginning the CUCA did not differentiate between unfair B2C and B2B commercial practices and prohibited unfairness in both types of relationships. Since the transposition of the Unfair Commercial Practices Directive in 2007 to a separate piece of legislation – the UCPA[18] – the CUCA is limited to unfair B2B trading practices. However, not only does the CUCA cover the horizontal relationships between traders, but also their vertical relationships, such as those in the supply chain. Unlike the APA, the CUCA is applicable to all sectors, not only to the food sector.

The most frequent unfair trading practices in the food supply chain are prohibited under Article 15 of the CUCA. This provision prohibits impeding access to the market and contains examples of such unfair trading practices, including charging fees for the acceptance of goods for sale, other than a trade margin [Article 15(1)(4) of CUCA]. One type of such fees, called slotting fee (shelf space price),[19] which is a payment for a prominent display of a product, is a common practice in the food supply chain. However, it only occurs on the highest level of the supply chain and does not involve the players on the lowest level, that is farmers. Suppliers often challenge and demand a return of the slotting fee from retailers under Article 15(1)(4) of the CUCA. The practice is generally illegal, however the Polish jurisprudence is not fully consistent (Sieradzka, 2017).

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16 Penal provisions of the CUCA do not cover any unfair trading practices in the food supply chain.

17 Act of 17 November 1964 Code of Civil Procedure [*Ustawa Kodeks postępowania cywilnego*] (Journal of Laws of the Republic of Poland 2018, item 1360 as amended).

18 See footnote 13.

19 In Polish *opłata półkowa*.

The general clause of the CUCA plays the role of a safety net for unfair trading practices other than those impeding the access to the market. It is based on the notion of 'unfair competition practice' defined as an activity contrary to the law or good practices, which threatens or infringes on the interest of another entrepreneur or customer [Article 3(1) of the CUCA]. Similarly, the APA prohibits practices contrary to good practices that infringe on the interest of another trader. Nevertheless, two differences between the general clauses in the CUCA and in the APA should be highlighted. First, the general clause in the APA does not provide for the possibility to prohibit a practice on the basis of being contrary to the law, as the CUCA does. Under the CUCA a civil court may assess trading practices in the food supply chain as contrary to the law, eg as contrary to the APA. Second difference lies in the interest of another trader that has to be infringed or threatened. The APA requires the interest to be significant and the CUCA only speaks of an interest. However, this dissimilarity seems to have no practical consequences.

It is worth mentioning that a privately enforced regulation, like the CUCA, may be beneficial for getting compensation that is not possible under the APA. However, apart from the above-mentioned proceedings on slotting fees, the rules on private enforcement under the CUCA (for others see section II.3 below), are not commonly used. The reluctance of the weaker party, often a farmer, to seek redress before a civil court has various reasons. First of all, the effectiveness of privately enforced laws is influenced by time and money factors. Court proceedings are lengthy, lasting up to several years (Explanatory Memorandum to the draft APA, p. 3) and may incur high costs such as court and lawyers' fees. However, the so-called 'fear factor' is seen to be the main reason for the insignificance of private enforcement in the food sector, according to the Polish and EU lawmakers (Explanatory Memorandum to the APA, p. 3 and Explanatory Memorandum to the draft UTPD, p. 2). The weaker party does not want to put an existing relationship with the stronger party at risk. Because of the fear factor, the CUCA provides a national or regional organization whose statutory objective is to protect the interests of traders for the possibility of acting on behalf of a trader, without a disclosure of its data [Article 19(1) of the CUCA]. Still, not all remedies are available for these organizations. They are not allowed to claim for compensation of damage caused by the unfair trading practice or for retuning unjustified benefits, which further reduces interest in private enforcement.

This was the key argument for the Polish parliament to introduce the APA with its public enforcement by the President of UOKiK. The draft

UTPD supports this approach and foresees the requirement to designate in each Member State a new or already existing enforcement authority for the prohibited unfair trading practices. Moreover, the Amending Act reduced the fear factor to a minimum. To protect farmers, the data on the person/entity who submitted notification of an unfair trading practice as well as the contents of the notification may not be disclosed at any stage of the proceedings before the President of UOKiK [Article 11(5) of the APA].

Taking into account the difficulties with the private enforcement of unfair trading practices, it is easy to draw the conclusion that the weaker party to a commercial transaction is under-protected under Polish private law.

2. Publicly enforced law

As it emerges from section I above, legislation providing for the publicly enforced general prohibition of unfair trading practices seemed necessary to solve the deep-rooted problems faced by small food producers and retailers. The APA is the first Polish statute to introduce such prohibition. The APA contains general provisions, defines prohibited practices as well as provides for principles of proceedings and administrative fines.

The prohibition is not applicable to all sectors. Instead, it can be applied only to the trade in agricultural and food products. The prohibition is based on the 'superior bargaining power' test (Pol. *przewaga kontraktowa*, in Polish official translations 'contractual advantage') as well as on the concept of unfairness (Article 7(1) and (2)) as described below in section III). The APA does not contain, however, a black list of automatically unfair practices encompassing the use of superior bargaining power or the use of 'contractual advantage' (hereinafter they will also be called – after the draft UTPD – unfair trading practices). Therefore, case-by-case assessments of business conduct from the perspective of its unfair or fair nature are a necessity (cf. Article 7(2)–(3)). Under the APA, a party to the proceedings does not need to be proved to be at fault. However, as a rule, only a culpable nature of practices (intentional wrongdoing or unintentional negligence) allows for fines being imposed by the enforcement authority (Articles 33, 34 and 36; see section IV.3 of this chapter).

The protection under the APA covers both suppliers and buyers ('two-sided' protection) in B2B food supply chains (Articles 1 and 6) and is not limited to SMEs, which is different from the 'one-sided' protection of suppliers in the draft UTPD (Piszcz, 2018, p. 152; see section III.1 of this chapter). On top of the above conditions, the prohibition is subject to

additional requirements under Article 2 and 3, providing for exceptions to the prohibition which limit its applicability. In particular, the *de minimis* rule enshrined in Article 2 points 1 and 2 has played an important restrictive role in the identification of prohibited practices. It applied if any of the turnover amounts has not been greater than thresholds provided for in Article 2 points 1 and 2. Therefore, the Amending Act that came into effect as of 11 December 2018 repealed points 1 and 2 in Article 2, thus expressly expanding the scope of application of the APA in favour of small market operators (see section III.1 below).

The institution in charge of public enforcement is the President of UOKiK (Article 8; see section IV.1 of this chapter).[20] It can initiate administrative proceedings *ex officio* – both preliminary proceedings without any parties and proceedings against an individual entity (Articles 9, 10 and 13). Regarding principles of proceedings, the APA solutions are generally modelled on the CCPA provisions (see section IV.2 below). It must be added that the prohibition is backed up by administrative sanctions, such as fines for an infringement and periodic penalty payments imposed in the case of failure to comply with adopted decisions (see section IV.3 below).

Finally, a mention must be made of the possibility to apply the CCPA provisions to unfair trading practices that are at the same time anti-competitive practices, namely the abuse of a dominant position (Article 9 of the CCPA; see section II.3 below). Unfair practices of entrepreneurs without dominant positions in a given relevant market are not subject to the CCPA. The enforcement authority is for both APA and CCPA the same – the President of UOKiK. Without any doubts, it can be added that there are numerous analogies between proceedings and sanctions provided for in both statutes.

3. Relationship between public enforcement law and other acts

According to Article 4 of the APA, protection against unfair use of contractual advantage (for the description of 'contractual advantage' see section III.2.1. below) is without prejudice to the protection under other acts, including in particular the provisions on combating unfair competition. So, the provision does not exclude the parallel application of the APA and other acts, both private and public, to one and the same practice. The rationale behind this regulation is the existence of numerous laws that

[20] In Polish *Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter, the President of UOKiK.

enable a consistent protection against unfair trading practices. Moreover, no specific application sequence of the regulations is required – the APA may be applied in parallel to other relevant acts.

Article 4 of the APA does not list explicitly any 'other acts'. However, the wording 'provisions on combating unfair competition' points to the piece of legislation based on the same notion – the CUCA (for details see section II.1 above).

The party whose interest were infringed by an unfair trading practice may also seek redress under the Polish Civil Code, which includes general provisions on contract law, such as rules on invalidity (Article 58), standard contracts (Article 384), exploitation (Article 388) or improper performance of the contract (Article 471).

Attention should also be paid to the Act on payment periods in commercial transactions.[21] This regulation transposes Directive 2011/7/EU[22] and sets out timetables within which bills must be settled. Furthermore, according to its Article 11a, the assessment whether contractual terms are grossly unfair to the creditor should be determined after consideration of all circumstances of the case, including gross deviations from good commercial practices that violate the principle of acting in good faith and the principle of reliability and the nature of the good or service that is the subject of a commercial transaction.

The National Support Centre for Agriculture protects traders additionally by examination of compliance with the obligation to conclude written contracts with farmers for the purchase of agricultural products.

Moreover, it is the CCPA that ensures additional protection against unfair trading practices in the food supply chain. The unfair use of contractual advantage in the meaning of the APA and the abuse of dominant position prohibited under the CCPA show significant similarities. Both practices require the misuse of a superior bargaining power that can manifest itself in the same form, for example in tying, prohibited under Article 7(3)(3) of the APA and Article 9(2)(4) of the CCPA. The most important difference between these provisions is that Article 9 of the CCPA requires the existence of dominant position – a market position which allows to prevent effective competition in a relevant market by enabling to act to a significant degree independently of competitors, contracting parties and consumers. It is assumed that an

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21 Act of 8 March 2013 on payment periods in trade transactions [*Ustawa o terminach płatności w transakcjach handlowych*] (consolidated text Journal of Laws of the Republic Poland 2019, item 118).

22 Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, p. 1.

undertaking holds a dominant position if its market share in the relevant market exceeds 40% [Article 4(10) of the CCPA]. Having a dominant position is not a requirement to apply Article 6 of the APA (see section III.3 below). It should be noted that Article 9 constitutes an alternative basis of protection, not a complementary one, because of the same enforcement authority and the rule *ne bis in idem* that, in general, does not allow double sanctioning of the same infringement (Doniec, 2016, p. 338).

4. Enforcement decisions and case law

Since APA's introduction in 2017, a number of proceedings have been opened by the President of UOKiK. Only one decision was issued (on March 5, 2018), in the *Cykoria* case.[23] The Amending Act that entered into force as of December 11, 2018 has been implicitly aimed at increasing the number of proceedings and decisions adopted, including decisions imposing fines. The President of UOKiK, who participated in the governmental legislative process, believed that after the amendment there might be around 1,000 proceedings and inspections per year.[24] The draft Amending Act was accompanied by a Regulatory Impact Assessment predicting that in 10 years after the amendment, infringers would pay PLN 53,380,000 (approx. EUR 12,500,000) of fines to the state budget.[25]

Although the President of UOKiK is already equipped with the powers to impose fines on infringers, the *Cykoria* case has been closed with a commitment decision where no fines are imposed. The infringer, a small food procurement wholesaler called Cykoria, was obliged to amend a selection of contractual provisions applied in contracts with vegetable farmers. The decision addresses a few important aspects of the APA provisions. First, at the centre of the Polish publicly enforced legal framework there is a concept of 'public interest'. Article 1 of the APA states that it lays down the rules and procedures in order to ensure the protection of the 'public interest'. The same wording is used also by Article 1 of the CCPA. Drawing on the jurisprudence related to the CCPA, the decision only explains that an

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23 Decision No. RBG-3/2018, *Cykoria* case. In Polish at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf.

24 Letter of the President of UOKiK to the Secretary of the Standing Committee of the Council of Ministers of 25 July 2018, https://legislacja.rcl.gov.pl/docs//2/12314353/12524829/12524830/dokument352439.PDF, p. 5.

25 Ibid, p. 3. Regulatory Impact Assessment, p. 3. Retrieved from: https://legislacja.rcl.gov.pl/docs//2/12314353/12524829/12524830/dokument352438.PDF.

infringement of public interest occurs mainly when the activity (practice) of a given entrepreneur threatens the general interest of society or of a wider circle of market participants. From there, this reasoning proceeds to the conclusion that in the *Cykoria* case, the public interest manifested itself in the scale of the practices in question. Adverse effects of the practices might have arisen for a wide range of addressees, including each supplier contracting with the infringer (for more see Piszcz, 2018, p. 150; see section III.4 of this chapter). Second, Article 7(2) of the APA considers the practice unfair where it is contrary to good practices and threatens or infringes a significant interest of the other party (see section III.3 below). The President of UOKiK does not create a catalogue of good practices in the decision but it suggests that their examples can be identified on the basis of practices named in the EU Commission's Green Paper on unfair trading practices in the business-to-business food and non-food supply chain[26] and/or 'Vertical relationships in the Food Supply Chain: Principles of Good Practice' of 29 November 2011.[27]

The *Cykoria* case is not the only case dealt with by the President of UOKiK. The authority conducted 20 preliminary proceedings and sent 16 requests for information to entrepreneurs (without the commencement of proceedings) in the first year of the application of the APA (UOKiK, 2018c). One of the first preliminary proceedings was related to the dairy sector. Its termination was accompanied by the President of UOKiK's report making recommendations as to what fair contracts should look like (UOKiK, 2018a). The report also identifies those contractual clauses that may be considered unfair trading practices, like exclusivity clauses requiring suppliers to release all the milk they produce to a specific buyer, clauses authorising the buyer to freely define or change the procurement prices, clauses providing the buyer with the right to terminate cooperation without a notice period.

As of July 12, 2018, the President of UOKiK has been dealing with 10 cases related to food purchasing markets for potatoes, cabbage, apples, beets and other foodstuffs, including the issue of charges imposed on suppliers by retail chains for using a purchase platform (UOKiK, 2018c). One of those proceedings is conducted against Südzucker, one of four sugar producers in Poland. The authority is examining Südzucker's relationships with eight randomly chosen sugar beet growers (UOKiK, 2018c). The

26 COM (2013) 37 final.

27 Retrieved from: http://www.aim.be/uploads/meeting_documents/B2B_principles_of_good_practice_in_the_food_supply_chain.pdf.

authority raised concerns over unclear rules of calculating the purchase price, preventing farmers from verifying the reliability of calculations made by the buyer. Since June 2018 (before summer harvest), UOKiK carried out inspections in the soft fruit sector, including strawberries, raspberries, cherries and currants. The apparent trigger were low purchase prices, which stood in contrast to much higher prices paid by end consumers, which prompted a wave of complaints by farmers to the President of UOKiK (UOKiK, 2018c). The authority inspected 77 processing plants and purchasing centres for soft fruits and apples and numerous retailers (UOKiK, 2018e; UOKiK, 2018f). The most frequent prohibited practices were the delays in payments; whereas payment dates should not exceed 60 days, they used to be even 90 days long, and it happened that they were not respected (UOKiK, 2018f).

Following the inspections, the President of UOKiK commenced proceedings against T.B. Fruit Polska (UOKiK, 2018b), Döhler (UOKiK, 2018d), Real, Rauch Polska (UOKiK, 2018f). It remains to be seen if and what calibre of decisions will be adopted in those cases.

It needs to be added that prior to the introduction of APA, a vast (albeit inconsistent) jurisprudence of Polish courts – from regional courts to the Supreme Court – had developed around combating unfair competition, in particular slotting fees (see section II.1 above), based on the privately enforced law.

III. Nature of infringement and scope of the publicly enforced law

1. Economic agents covered by the law (*ratione personae*)

The protection under the APA covers both suppliers and buyers ('two-sided' protection) in B2b food supply chains (Articles 1 and 6) which appears different from the 'one-sided' protection of suppliers against non-SME buyers provided for in the draft UTPD (Piszcz, 2018, p. 152). Moreover, the category of SMEs is a category around which the protection against unfair trading practices is constructed under the draft UTPD, whereas under the APA the protection is not limited to SMEs. The above has not been changed by the Amending Act of 2018.

However, the APA contains an array of exceptions to the scope *ratione personae* of the prohibition. One of them is the subjective exclusion provided for in Article 3 of the APA. This exclusion is based on the organisational 'buyer – supplier' relationships of a special type and is related to practices

in the following relationships: (a) cooperative – its member, (b) agricultural producer group – its member, (c) member of a preliminarily recognised producer organisation for fruit and vegetables – another member thereof, (d) member of a recognised producer organisation for fruit and vegetables – another member thereof. In the case of unfair trading practices in those relationships, the APA shall not be applicable.

Second, Article 2 of the APA at the beginning (*in principio*) implies that parties to direct supplies in the meaning of Article 1(2)(c) of the Regulation of the European Parliament and of the Council 852/2004[28] (ie direct supplies, by the producer, of small quantities of primary products to the final consumer or to local retail establishments directly supplying the final consumer) are excluded from the APA scope.

Before 11 December 2018 also the *de minimis* rule was applied if any of the following conditions was not met:

(a) the aggregate turnover between the parties in the year of commencement of the proceedings concerning the prohibited practices or in any of the two years preceding that year exceeded the amount of PLN 50,000 (approx. EUR 12,000) – Article 2(1) of the APA (now repealed),
(b) in the year preceding the year of commencement of the proceedings concerning the prohibited practices, the turnover of the infringer (or, in the case of the infringer being part of a capital group, the turnover of such group) exceeded the amount of PLN 100,000,000 (approx. EUR 24,000,000) – Article 2(2) of the APA (now repealed).

The *de minimis* rule received many critical comments, including a popular one that the thresholds were too low, which could result in a broad scope for intervention of the President of UOKiK (cf. Jurkowska-Gomułka, 2017, p. 10; Krasnodębska-Tomkiel, 2017, p. 689; Salitra, 2017, p. 132; Stawicki, 2017). Exceptions combined with the thresholds for the application of the APA resulted in a fairly convoluted legislation, though less so since the enactment of the Amending Act of 2018. The Amending Act provides for not only the simplification of the superior bargaining power ('contractual advantage') test but also repeals the *de minimis* rule. On the one hand, this expands the scope of application of the APA in favour of small-scale farmers and other small market operators as well as makes the APA more compliant with the minima of protection provided for by the draft UTPD. On the other hand, this may be identified as regulatory trend to protect more and more market operators.

[28] Commission Regulation (EC) No. 852/2004 of 29 April 2004 on the hygiene of foodstuffs, OJ L 139, 2004, p. 1.

2. Nature of prohibited practices

The nature of practices prohibited under the APA comes down to unfair use of superior bargaining power in the food supply chain. However, it needs to be highlighted that it is the notion of 'contractual advantage' and not 'superior bargaining power' that exists in the English version of the APA and is commonly used when speaking about the APA in English, including by the President of UOKiK[29] and in scientific papers (eg Błachucki and Jóźwiak-Górny, 2018). The contractual advantage is a literal translation into English of a new wording in Polish law – *przewaga kontraktowa*. Contractual advantage in the meaning of the APA matches the concepts of superior bargaining power and unfair trading practice. It is however the latter notion that will gain popularity after the adoption of the UTPD. Nevertheless, it remains unknown whether 'contractual advantage' will be then changed into 'unfair trading practice' or not. The Polish lawmaker may want to keep the wording even after the transposition of the UTPD into Polish law to maintain the specificity of national legislation.

The Polish approach to the prohibition of unfair trading practices is as follows: Article 6 of the APA prohibits any unfair use of contractual advantage by the buyer against the supplier or by the supplier against the buyer. Article 6 of the APA is specified by Article 7(2), which explains that the use of contractual advantage shall be considered unfair where it is contrary to good practices and poses a threat to the significant interest of the other parties or infringes upon such interests. Additionally, Article 7(3) of the APA contains a list of examples of unfair use of contractual advantage. Therefore, no exhaustive list of unfair trading practices exists in the APA.

The first decision of the President of UOKiK based on the APA (which is the only decision so far; see section II.4 of this chapter) reveals two characteristic features of unfair trading practices in Poland. First, it is clear that buyers, and not suppliers, violate the law although the opposite would also be forbidden under the Polish Act. Second, the unfair trading practices in Poland consist of unfair contract terms which may be prohibited under the general clause in Article 6 of the APA and which are not specified in Article 7(3) of the APA. It is therefore justified to say that the APA is fit for purpose. Its legislative approach – the general clause – enables a flexible application of the APA, at least when it comes to the subjective scope of the enforcement.

[29] See eg https://uokik.gov.pl/news.php?news_id=14682.

3. Scope *rationae materiae* of the law

The APA prohibits in Article 6 the unfair use of contractual advantage in the trade in agricultural and food products. It follows that the APA requires:

1) existence of contractual advantage in trade in agricultural and food products and
2) unfair use of contractual advantage.

3.1. Definition of contractual advantage

The notion of contractual advantage is defined in Article 7(1) of the APA as the existence of a significant disparity in economic potential of the buyer versus the supplier or of the supplier versus the buyer.

The definition of contractual advantage underwent considerable simplification in the Amending Act of 2018. In the original version, APA defined the contractual advantage by two cumulative criteria: 1) where the supplier does not have sufficient and actual opportunities to sell agricultural or food products to other buyers and 2) where there is a significant disparity in economic potential between the two entities which puts the buyer at an advantage, or such position of the supplier towards the buyer where the buyer does not have sufficient and actual opportunities to buy agricultural or food products from other suppliers and where there is a significant disparity in economic potential between the two entities, which puts the supplier at an advantage.

After the amendments of 2018 only the existence of significant disparity in economic potential plays a role in Article 7(1) of the APA. The reduction of the requirements contained in the lengthy definition of 2016 may simplify the application of the APA. Still, there is no common position in Polish literature on how to assess the disparity in economic potential. On the one hand, a comparison of objective criteria, such as size of the buyer and supplier, can be taken into account. On the other hand, the existence of an economic dependence may be decided on the significant economic disparity. That said, a flexible approach that combines both concepts presented above should be applied (Namysłowska and Piszcz, 2017, p. 87–90).

Under the APA of 2016, the President of UOKiK made plausible the occurrence of contractual advantage in the *Cykoria* case on the basis of significant disparity in economic potential due to the size of the buyer, diversification of revenue sources, independence from one food product

because of many branches of activity and the fact that 13 of 14 suppliers were private persons and they could not influence the terms of cooperation.

Interestingly, the Polish concept of contractual advantage, unlike in the draft UTPD, prohibits the practices of both parties in the supply chain. The draft UTPD is based on the concept that it is the buyer who may act unfairly, which is close to business reality. The APA also prohibits, at least hypothetically, unfair trading practices of a supplier (see section III.4 below).

Although the wording of contractual advantage points to the contract, the APA does not require the existence of a contract between a supplier and a buyer. Unfair use of contractual advantage can be prohibited even before the conclusion of a contract or after its termination.

Finally, it must be emphasised that it is not the existence of contractual advantage that is prohibited. Contractual advantage, like the dominant position in the meaning of the CCPA or of Article 102 of the Treaty on the Functioning of the European Union, is not prohibited as such. Only the unfair use of the contractual advantage is banned under Article 6 of the APA (see section III.2.2 below).

3.2. Unfair use of contractual advantage

As mentioned above, the concept of unfairness in the APA is based on the approach and wording that is rooted in Polish law on unfair competition (see section II.1 above). Therefore, also under Article 7(2) of the APA, two cumulative criteria must be met to assess the use of contractual advantage as unfair. The practice:

1) should be contrary to good practices and
2) should threaten a significant interest of another party or infringe such interest.

The application of Article 7(2) of the APA requires a complex analysis because there is no general definition of good practices. One practice can be unfair in the food supply chain and fair in the supply chain of another sector. The differences can occur in vertical and horizontal B2B relationships or between B2C and B2B practices. It follows that a good practice can only be defined *in casu*.

As regards the first condition of Article 7(2), the practice contrary to good practices must result from having contractual advantage. However, it must be stressed once again, that not every practice of a trader having contractual advantage is contrary to good practices. Therefore the President of UOKiK has to decide whether a practice in question is or is not a good

practice, taking into account special features of the food supply chain. To give an example: food products are perishable and therefore cancelling orders at short notice causes incomparably more difficulties as in the case of other products. The rules of price calculation are also a problem: the quality of food products changes quickly in a short period of time, which may influence the price in an unexpected way, so the price should not only depend on the quality. However, the principle of freedom of contract must also be considered.

Additionally, a practice contrary to good practices must threaten a significant interest of another party or infringe such interest. Because usually the buyer acts contrary to the APA, it is the supplier whose interest would be infringed. The President of UOKiK should analyse the infringement of economic interest, that is causing to the supplier considerable difficulties in planning further actions, prohibition of business relations to other buyers, imposing unpredictable prices.

3.3. Examples of unfair use of contractual advantage

The APA lays down in Article 7(3) examples of unfair use of contractual advantage:

1) unreasonable termination or threat of termination of a contract;
2) arrangements whereby only one of the parties is entitled to terminate or withdraw from a contract or to rescind such contract;
3) making the conclusion of a contract contingent upon the acceptance or fulfilment by the other party of other consideration, having neither substantive nor customary relation with the subject of such contract;
4) unreasonable extension of payment periods for the agricultural or food products.

Article 7(3) points to the most common practices in the Polish food supply chain. Particularly the practices in point 3 ('tying') and point 4 (extension of payment period) occur frequently. The list is short, but other practices may be prohibited under the general clause. The best example of this mixed legislative concept (general clause and specific provisions) is visible in the *Cykoria* case. According to the President of UOKiK, the unfair use of contractual advantage included unreasonable extension of payment periods to the suppliers, prohibited under Article 7(3)(4) of the APA (one practice) as well as the use of unfair contractual terms (three practices) that is prohibited under Article 7(2).

Another issue regarding the Polish legislative approach concerns the relation of Article 7(3) of the APA (specific provisions) to Article 6 and 7(2) of the APA (general clause), that is whether it is necessary to examine separately that a practice meets the criteria specified in Article 7(3) of the APA and the requirements set out in Article 7(2) of the APA. The problem is well known from the EU jurisprudence on the UCPD[30] that can find analogous application to the provisions of the APA. The wording of Article 7(3) supports this view: it gives examples of unfair use of contractual advantage – and neither of practices that are contrary to good practices nor of practices that infringe significant interest of the other party. It means that both criteria of Article 7(2) are met by the practices listed in Article 7(3). Moreover, the criteria in Article 7(3) are detailed enough to apply them separately, without additional requirements. Then, the main purpose of Article 7(3) is to show examples of unfair trading practices. Thanks to these examples the actors in the food supply chain can act in accordance with the APA. Finally, Article 7(3) lays down prohibitions of significant infringements – it is difficult to image a practice prohibited under this provision that is not contrary to Article 7(2). Therefore, even the parallel application of both provisions in the *Cykoria* case does not change the assessment of a practice.

4. Conditions for the application of the law

It must be noted that the President of UOKiK applies the APA to protect the public interest (Article 1 of the APA; see also section II.4 of this chapter). Hence, the President of UOKiK is obliged to indicate the public interest in a specific case. This is understandable – the involvement of a public authority requires the protection of public interest. Nevertheless, the indication of public interest is a complicated task under the APA. It follows from the provisions of the APA that the Act can be applied in cases concerning individual contractual relationships – Article 7(3) prohibits a single practice of tying, not the recurrent ones. Moreover, the APA protects even very small suppliers (see section III.1 below). To prove the existence of public interest in such cases seems to be impossible and dealing with such cases may not correspond to the tasks of the President of UOKiK (Jurkowska-Gomułka, 2017, p. 15–19; Sroczyński, 2017, p. 657–658; Krasnodębska-Tomkiel, 2017, p. 689).

[30] Judgments of the Court of the European Union: of 19.9.2019, C-435/11 *CHS Tour Services*, ECLI: EU:C:2013:574; of 16.4.2015, C-388/13 *UPC Magyarország*, ECLI:EU:C:2015:225.

Moreover, the scope of the notion of 'public interest' used in Article 1 of the APA is unclear. The explanatory memorandum to the draft APA points to its various aims such as the protection of food security and of food safety. It is worth stating that they seem to be used by the Polish lawmaker as synonyms, which is not the case. Therefore the value of these statements may be questioned. The protection of food quality and of consumers is also mentioned in the draft documents. Paradoxically, the contribution of the APA to the reduction in occurrence of unfair trading practices was not indicated.

Nevertheless, the President of UOKiK seems to have found a solution on how to act in public interest. The proceedings are most often initiated when a big buyer uses unfair contracts terms with many suppliers. In *Cykoria* case 14 suppliers were faced with the unfair trading practice. The President of UOKiK stated that public interest generally concerns all market participants, that is an unspecified number of market participants and it is the scale of the practices in question that should be taken into account (see also section II.4 of this chapter). Also new proceedings have recently been initiated as a result of the fruit sector inquiry, when it came to light that big buyers use the same contract terms toward numerous suppliers. On the one hand, this approach is convincing – some practices, eg unfair contract terms, can have a negative effect on the market. On the other hand, many unfair trading practices do not have that quasi-collective nature which could justify easily the protection of public interest. Therefore, small suppliers in Poland are still under-protected, even under publicly enforced law.

IV. Public enforcement institution and proceedings

1. Institution in charge of public enforcement

The President of UOKiK, a single administrative authority responsible first and foremost for the protection of competition and consumers under the CCPA, has been equipped and conferred also by the APA with the powers to investigate cases as well as to take enforcement decisions concerning them (Article 8 et seq. of the APA). In organisational terms, the team responsible for the APA enforcement is situated in one of the nine UOKiK regional branch offices, the regional branch office in Bydgoszcz. The Polish legislature chose to expand the mandate of an existing authority rather than establish a new enforcement authority. The draft UTPD does not

explicitly favour any of these two solutions. The Explanatory Memorandum[31] suggests, however, that existing enforcement authorities, for example, in the area of competition law[32] (national competition authorities) could be chosen as the competent authority to realise economies of scope. It remains to be seen whether this attitude will also prevail in the case of other EU Member States. However, choosing the President of UOKiK as the authority enforcing the APA has been criticised by Polish commentators (Jurkowska-Gomułka, 2017, p. 9–18; Krasnodębska-Tomkiel, 2017, p. 688–690). Concerns have been expressed that a new trend might have appeared consisting of entrusting the President of UOKiK with regulatory competences in markets not covered by the competences of any other specialised authority (Krasnodębska-Tomkiel, 2017, p. 690). The question has arisen whether the legislature is going to turn the President of UOKiK into a multi-sectorial regulatory authority. However, the EU legislative initiative may provide arguments for the choice of the President of UOKiK as the authority enforcing the APA (Piszcz, 2018, p. 161).

2. Type and principles of proceedings

The President of UOKiK commences administrative proceedings solely on its own initiative (Article 9(1) of the APA), both preliminary proceedings without any parties and its 'core' proceedings against an individual entity (Articles 9, 10 and 13 of the APA). This design of the commencement of proceedings is modelled after the CCPA procedural provisions, which has been criticised in the literature (Jurkowska-Gomułka, 2017, p. 12). The status of a party to the proceedings is reserved to those to whom the infringement is, rightly or wrongly, attributed to by the President of UOKiK.

The authority cannot act by way of complaints. However, Article 11 of the APA allows to notify the President of UOKiK in writing of the suspicion that prohibited practices have taken place. Before 11 December 2018 only an alleged victim of an infringement was entitled to do so by Article 11 of the APA. A notification could not be filed by producer organisations or associations of producer organisations whose member(s) or member(s) of their members were affected by a prohibited practice, even though such right could have proven effective; no wonder this approach faced criticism in literature (Jurkowska-Gomułka, 2017, p. 12).

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31 COM(2018) 173 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0173&from=EN, p. 14.

32 And, interestingly, agricultural policy is not explicitly exemplified.

The Amending Act of 2018 provides for two amendments in this area. First, after the CCPA, Article 11(1) of the APA states that a notification may be filed by any person and not only by an alleged victim of an infringement. Second, the following paragraph is inserted after paragraph 4 of Article 11: '5. At any stage of the proceedings, data identifying a person who has filed the notification and contents of the notification must not be revealed to the parties of the proceedings'. This amendment is considered by the legal drafters to be of arranging nature solely.[33]

A notification is not binding upon the President of UOKiK (does not oblige the President of UOKiK to initiate proceedings). In the case of *ex officio* initiation of proceedings, a person who submitted a notification is not a party to the proceedings and cannot appeal against the resulting decision. A person who submitted a notification is informed in writing about the *ex officio* initiation of proceedings or about insufficient grounds for such initiation; the information must explain the reasons for what the President of UOKiK decided to do in the case. A letter containing such information from the President of UOKiK cannot be questioned before a court. These solutions do not seem incompatible with Article 5(4) of the draft UTPD (Piszcz, 2018, p. 162).

Regarding principles of proceedings, numerous multi-level references are made to provisions of the CCPA on proceedings before the President of UOKiK[34] and other statutory provisions,[35] from time to time making it quite difficult to interpret them (Namysłowska and Piszcz, 2017, p. 13). Procedural provisions of the APA use references to the CCPA so frequently that it has been proposed by commentators that this legal framework could have been included into the CCPA (Krasnodębska-Tomkiel, 2017, p. 688–689). However, at some points proceedings provided for by the APA are different from the ones regulated by the CCPA. It is worth adding that to some extent the powers of the President of UOKiK go even beyond Article 6(a)–(e) of the draft UTPD.[36]

Subject to Article 26(3) of the APA, the burden of proof in administrative proceedings rests on the President of UOKiK. Under the APA, the President of UOKiK can initiate and conduct inspections (Article 16–22 of the APA) but not dawn raids. The authority can also ask or require buyers and suppliers to provide all necessary information regarding prohibited practices

33 Explanatory Notes accompanying the draft Amending Act, p. 2–3. Retrieved from: https://legislacja.rcl.gov.pl/docs//2/12314353/12524829/12524830/dokument352438.PDF.

34 Eg Articles 15, 20 and 29.

35 Including the Administrative Procedure Code and the Civil Procedure Code.

36 See Article 8 of the draft UTPD.

(Article 12 and 14 of the APA). Further, the President of UOKiK can adopt various types of decisions: infringement decisions, that is decisions establishing an infringement of the prohibitions and, if necessary, requiring the party to terminate the prohibited practice (Article 26 of the APA)[37] and/or imposing fine,[38] commitment decisions (Article 27) and decisions or orders on discontinuation of proceedings. Pursuant to Article 28 of the APA, the President of UOKiK can also rule that its decision is immediately enforceable, in whole or in part, if the protection of significant interests of suppliers or buyers requires so (before 11 December 2018 it was possible only in cases where the prohibited practice posed a threat to further functioning of the entrepreneur against whom the party to the proceedings had used its unfair practice). The Amending Act of 2018 changes the conditions of such ruling so that they are similar to the ones provided for in the CCPA.

The authority is competent to issue above-mentioned decisions, except for abstaining from taking a decision for the reasons described in the draft UTPD[39]. Another President of UOKiK's competence is the publication of decisions taken in this context (Article 30 of the APA). These powers are largely modelled on its powers as the national competition authority. Only the competence to inform buyers and suppliers about its activities, by way of annual reports, which shall describe the number of complaints received and the investigations initiated and closed by it in a detailed way (Article 6(f) of the draft UTPD), is not explicitly provided for under Polish legislation. The President of UOKiK, however, publishes its general annual report based on Article 31(9) of the CCPA, presenting – for selected cases – summary descriptions of the matter and the outcomes. In this way, markets get a chance to be informed about the President of UOKiK's activities.

The APA provides for time limits beyond which a ruling to institute proceedings cannot be taken. The period of limitation is currently set at two years from the end of the year in which the prohibited practice ceased (Article 32(1) of the APA) which is shorter than under the CCPA.

The judicial control is provided for by Article 29 of the APA upon an action by the alleged author of the infringement. The decision can be appealed to the Court of Competition and Consumer Protection (Pol. *Sąd Ochrony Konkurencji i Konsumentów*) which is a part of the Regional

37 But not decisions on remedies.

38 But not subject to 'settlement' (the so-called procedure of a voluntary acceptance of a fine – Article 89a of the CCPA).

39 If such decision would risk revealing the identity of a complainant or disclosing any other information in respect of which the complainant considers disclosure harmful to his interests, provided that the complainant has identified that information (Article 5(3)).

Court in Warsaw. Its judgments can be appealed to the Appellate Court of Warsaw. Judgments of the latter can be appealed in cassation to the Supreme Court of the Republic of Poland.

3. Fines and other sanctions

Article 6(d) of the draft UTPD requires the enforcement authority to have the power to impose pecuniary fines that shall be effective, proportionate and dissuasive taking into account the nature, duration and gravity of the infringement. The President of UOKiK is equipped with such power (even though it has not used it until present[40]) and the list of possible sanctions is quite long.

In the case of an infringement of the prohibition of unfair trading practices, a fine of up to 3% of the annual turnover (in its accountancy meaning) may be imposed on the infringer (Article 33 of the APA).[41]

Procedural fines of up to:

- EUR 50,000,000 may be imposed on an entrepreneur (Article 34 of the APA),
- the amount equivalent to fifty times the average salary in the entrepreneur sector for the last month of the quarter preceding the day on which the relevant decision was issued – on a person holding a managerial position or forming part of a management body of the entrepreneur, some persons authorised by the inspected entrepreneur and/or being its employees (Article 36(1)–(2)),
- PLN 5,000 (approx. EUR 1,170) – on a witness or expert (Article 36(3)).

According to Article 35 of the APA, periodic penalty payments of up to EUR 10,000 per day may be imposed on an entrepreneur in the case of failure to comply with adopted decisions, qualified by the European Commission as *astreintes* (European Commission, 2018, p. 171, 242).

In general, only a culpable nature of practices (intentional wrongdoing or unintentional negligence) allows for fines being imposed by the President of UOKiK; however, this is not the case with periodic penalty payments.

Article 37 of the APA presents the criteria to be used by the President of UOKiK to determine the amount of a fine, applicable to various types of fines. Only in the case of fines imposed on witnesses and experts, no criteria have been set out.

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40 See section II.4 above.

41 Under the CCPA it is considerably more, ie 10%.

The Amending Act that came into force 2018 has not changed these principles. Their present shape has not been considered by legal drafters as requiring improvements.

V. Conclusions

Polish legislation on unfair trading practices in the food supply chain seems to be multifaceted and complex. The affected party may choose between various instruments of private and public law. However, it is the APA – a relatively new piece of publicly enforced law – that may become the most important regulation on unfair practices in the food supply chain. Though, the new regulation is rarely applied which may change soon – due to the adoption of the Amending Act of 2018.

The Polish conceptual approach based on a public authority, equipped with powers to enforce the prohibitions of unfair trading practices, already corresponds to the EU solution presented in the draft UTPD. Nevertheless, the differences between the concepts of the APA and the draft UTPD, including its scope *ratione personae*, focus on contract transparency and minimum harmonisation clause, will lead to a vivid discussion on the next amendments of the Polish regulation.

As for today it remains to be seen whether the APA clearly improves the functioning of the food supply chain or if the UTPD brings better results.

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SLOVAKIA

I. Introduction

1. Description of the food sector in Slovakia

Slovak law does not provide any legal definition of the term 'food supply chain'. Therefore, for the purposes of this paper, we will work with the definition of the European Commission: '*The business-to-business (B2B) food supply chain is a chain of transactions between undertakings or between undertakings and public authorities, that leads to the delivery of goods destinated mainly to the general public for personal or household consumption utilization*'.[1]

To describe specific features and role of the food supply chain in Slovakia, we will follow the methodology and analysis of the agricultural sector, the food processing industry and the distribution sectors (wholesale and retail) used by the European Commission's Directorate-General for Economic and Financial Affairs (Bukeviciute, Dierx and Ilzkovitz, 2009, p. 40).

Activities of the **agricultural sector** include crop production and the raising of livestock. As agricultural commodities comprise of very different

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1 European Commission, Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-food Supply Chain in Europe, point 1 (COM(2013) 37 final). Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013DC0037 (last visited on 31.10.2018).

products, the sector's distribution channels are equally diverse. Firms in the agricultural sector primarily sell their output to the food processing industry and to itself (e.g. animal feed), but also sell directly to retailers, final consumers or alternative markets, such as biofuels (Bukeviciute, Dierx and Ilzkovitz, 2009, p. 4).

The **food processing industry** is very heterogeneous and comprises a number of varied activities. These include for example refining (sugar), milling (cereals), cleaning, cutting or drying (fruit and vegetables) and slaughtering and disassembling (livestock). The different inputs are processed in successive stages and to different degrees, packaged and dispatched to customers (e.g. distributors, food service). Another important activity of food manufacturers is to carry out market and product research leading to the development of new products, and to engage in marketing (Bukeviciute, Dierx and Ilzkovitz, 2009, p. 4).

The **distribution sector** (and retail in particular) is the principal outlet for food products and, being the final link in the supply chain, it interacts directly with final consumers. While the sector's main activity is the sale of products, in doing so, retailers may also carry out services for food manufacturers, such as promotional activities (Bukeviciute, Dierx and Ilzkovitz, 2009, p. 4).

Although Slovakia was historically an agricultural country, its character has changed and only about 4% of the working population are employed in agriculture (compared to 23% in industry) and gross output of agricultural production is up to 3% (compared to 52% for industrial production) (Statistical Yearbook of the Slovak Republic, 2017, p. 110).

The Antimonopoly Office of the Slovak Republic (hereinafter 'AMO' or 'Antimonopoly Office') recently investigated the structure of the agriculture and food sector in several cases – *AGROFERT*, *AHOLD*, *CBA*, *BILLA*/*DELVITA* concentration cases and the *RAJO* resale-price-maintenance case. Since Agrofert gave up its formal entrance into bakery companies, the procedure was formally terminated and no further details were published.

According to AMO findings in the *RAJO* case, the total turnover in the food sector is more than EUR 4 billion and 80–90% of its output is sold to final consumers via supermarket chains.[2] A substantial market share was historically held by Tesco (24% in 2013) and the COOP network (25% in 2013), followed by Lidl, Kaufland and Billa (8–13% in 2013).[3] By 2017, the turnover of Tesco grew a little (from EUR 1.26 billion to 1.45 billion),

2 Decision of 13 June 2016, No. 2016/KV/2/1/029, *RAJO*, para. 96.

3 *Ibid.*, para. 94.

the turnover of Lidl and Kaufland rose from less than EUR 700 million to over one billion each.[4]

Taking into account the shareholder structure, it is obvious that majority of the retail market in the food sector is held by foreign-owned companies (approximately 65% of the supermarket retail market is held by Tesco, Lidl and Kaufland).

Slovak Statistical Office data shows that there is a negative trade balance in food products.

Negative trade balance, together with the strong position of foreign retail chains has led to political criticism of the low share of Slovak food products in the retail chains in Slovakia.[5] Due to current data, the share of Slovak food product on the shelves is continuously falling – from 50% in 2011 to 37.2% in 2017.[6] It must be noted, that the share varies depending on which retailer is looked at – Lidl sold 14% of Slovak products in its total offering while the Coop chain 56%.[7]

It can be concluded that the retail market in food products is dominated by chains with mostly foreign ownership.

On the supply side the situation varies according to the product involved. There are several strong players in the primary agriculture production (HYZA in poultry production, FARMA MAJCICHOV in milk, meat and corn production, NOVOGAL in egg production) but none of them hold a dominant position. On the other hand, the position of food processing companies is strong, often with a leader in a given sector (such as RAJO in milk processing). Turnover of such 'sector leaders' reaches about EUR 100 million. RAJO's turnover exceeds 170 million, making it number one among food processing and agricultural companies).[8] Also the market share of these 'sub-sector' leaders is quite strong. For example, the market share of Agrofert Holding in poultry meat processing is about 40–50%[9] and the second biggest producer, MECOM TRADE covers 23–30% of market. RAJO processes about 20% of milk produced in Slovakia, its major

4 Sources form the Register of Financial Statements (www.registeruz.sk) where annual financial statements of companies in Slovakia are published (last visited 12.12.2018).

5 E.g. https://www.teraz.sk/ekonomika/podiel-vystavenych-slovenskych-potravin/332504-clanok.html, http://www.sppk.sk/clanok/183 (last visited on 31.10.2018).

6 https://dennikn.sk/767889/podiel-slovenskych-potravin-v-obchodoch-opat-klesol/ (last visited on 31.10.2018).

7 https://dennikn.sk/767889/podiel-slovenskych-potravin-v-obchodoch-opat-klesol/ (last visited on 31.10.2018).

8 All data based on financial statements of companies, see www.finstat.sk (last visited on 12.12.2018).

9 Decision of 6 October 2011, No. AMO dec. 2011/FH/3/1/040.

competitor (group Tatranská mliekareň together with Agro Tami) about 23%, while shares of other companies are less than 10%.[10] This market position has allowed RAJO to influence market strategies of retail chains BILLA, Retail Value Stores (Carrefour) CBA, Coop, Kaufland, TERNO as well as TESCO and impose resale price maintenance obligations, and enforce them from 2009 to 2014 (until AMO intervened with inspections).[11]

2. Map of relevant laws

In Slovakia, unfair trading practices (B2B) are covered by three spheres of legislation:

(1) private law regulation, particularly **Act No. 513/1991 Coll. Commercial Code, as amended** (hereinafter the 'Commercial Code');
(2) antitrust rules, particularly **Act No. 136/2001 Coll. on the Protection of Competition**, as amended (hereinafter the 'Act on Competition') and EU competition rules;
(3) public law rules on unfair trading practices, currently represented by **Act No. 362/2012 on unfair conditions in business relations** involving foodstuffs (hereinafter 'Act on Unfair Trading Practices' or 'UTP').

While the first two types of legislation show certain stability, the third group have witnessed several changes. The first attempt to regulate activities of supermarket retail chains was Act No. 382/2003 Coll. on retail chains. Act No. 382/2003 Coll. prohibited abuse of economic power and contained in Art. 3(1) the following general clause: '*Abuse of economic power is a relationship of an operator of a retail chain and its supplier in which bargaining advantage of the operator stemming from its economic power allows the operator of a retail chain to enter into a contractual relationship with a supplier in substantially advantageous conditions which could not be achieved without such bargaining advantage.*' The Act also contained quite a long and non-exhaustive list of abusive practices. The Act defined economic power as a market share of an undertaking or group of undertakings or their alliance on the relevant market in the Slovak Republic of at least 5% or annual turnover of more than 1.5 billion Slovak crowns (approx. EUR 498 million). From the analysis of the market situation above it is obvious that almost all relevant retail chains fell under the definition of 'economic

[10] Decision of 13 June 2016, No. 2016/KV/2/1/029, *RAJO*, para. 83.
[11] *Ibid.*

power'. Act No. 382/2003 Coll. covered food, cosmetics, soap, detergents, polishing agents, waxes and candles.

From 2009, Act No. 382/2003 Coll. was replaced by Act No. 172/2008 Coll. on unfair conditions in trade relations and an amendment of Act of the Slovak National Council No. 30/1992 Coll. on Slovak Agriculture and Food Chamber. While the rationale of Act No. 382/2003 Coll. focused on the abuse of economic power, Act No. 172/2008 Coll. represented a shift to a new type of legislation aimed against certain practices. The new Act introduced an exhaustive list of prohibited practices without any general clause. Act No. 172/2008 Coll. still covered all types of products – food and non-food, however this approach was quite short-lived and in May 2010, the application of prohibition of certain trade conditions was reduced to the food sector, by a repeal of Act No. 17/2008 Coll. by Act No. 140/2010 Coll. on unfair conditions in trade relations. Finally, this line of legislation was terminated by Act No. 207/2011 Coll. that from August 2011 repealed Act No. 140/2010 Coll. According to the explanatory memorandum attached to Act No. 207/2011 Coll., the reason for the repeals were the ineffectiveness of the intrusion into business relations and the proposition that private-law instruments were sufficient to counter unfair trading practices. Despite this attempt by the right-wing liberal government of Prime Minister Iveta Radičová, the UTP law was re-introduced by the socialist government of Prime Minister Robert Fico in 2012. The current Act on Unfair Trading Practices almost exactly followed the provisions of the previous Act No. 140/2010 Coll.

Currently there are efforts by one of the parties in the governing coalition (the nationalist Slovak National Party) to strengthen legislation aimed against retail chains and in order to protect Slovak food producers (it must be noted that one of the major food producers in Slovakia is Czech Agrofert Holding, owned by the current Czech Prime Minister).

In October 2018, the Ministry of Agriculture and Rural Development submitted a draft Act on fair trading relations in food trade.[12] According to the press release of the ministry, the new Act will introduce the elimination of hidden payments, reduce the maturity of payment, the possibility of anonymous complaints and harsher fines.[13] The ministry explained that the new legislation will counter the ability of undertakings which try to avoid existing prohibitions by 'creative' names of particular contractual

[12] See https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2018-65 (last visited on 31.10.2018).

[13] http://www.mpsr.sk/index.php?navID=1&navID2=1&sID=111&id=13487 (last visited on 31.10.2018).

clauses.[14] The authors of this paper do not agree with this reasoning of the ministry since a legal regulation cannot be circumvented purely by 'renaming' a clause because it must be still assessed according to its content. A statutory reduction of the maturity of payments for supplied goods notwithstanding the issuing of a proper invoice, as expected by the draft law, can lead to a disproportionate situation. First, the food sector will be the only sector with such short payment terms (not longer than 30 days after delivery, or regarding some products not longer than 15 days). Second, such short periods for payment cannot be in line with the VAT Act which requires to issue an invoice within 15 days after delivery of goods. Hence it can happen that the purchaser will be obliged to pay for goods without having an invoice for the product (thus also without knowledge of the exact amount due). Finally, the ministry apparently tried to introduce sort of a general clause for 'unfair trading practices'. However, it introduces an enumerative list of unfair trading practices without any general clause even though one of the 'unfair practices' is 'behaviour that deviates from fair business relationship'.[15] In fact, this is not a 'general clause' but an additional form of unfair practice that refers to legally uncertain notions that require further explanation in case-law. Moreover, general features of unfair trading practices were well-explained by European Commission's papers as well as previous Slovak legislation (abuse of economic power) and therefore introducing a proper general clause is not impossible.

After overall assessment of the text of the draft of the new legislation it appears that the new Act will bring little new to the Slovak legal order and will be hardly a milestone in the development of legislation against the abuse of bargaining power.

The draft bill was adopted by the parliament on 5th February 2019 and its final version contained several controversial elements. The first one is procedural, since the appeal against the decision of the Ministry of Agriculture imposing a fine does not have suspensory effect, which is an exemption in the Slovak administrative procedural law. The second one is substantial, because this law introduces a duty related to print or electronic marketing. The seller of food products is obliged to ensure that at least half of advertised agriculture products in every flyer, magazine or other communication shall be food products produced in Slovakia. The first element was criticized due to excepting a certain group of undertakings

14 http://www.mpsr.sk/index.php?navID=1&navID2=1&sID=111&id=13487 (last visited on 31.10.2018).

15 Art. 4(7) of the draft.

from general rules of administrative procedural law. The second element is seen as contrary to Article 34 of the Treaty on the Functioning of the European Union, since it limits advertising of products made in other Member States. Due to these objections, the President of the Republic vetoed the bill on 21 February 2019.[16]

Much more controversial than the previous draft is the Act on a special duty for retail chains (Act No 385/2018 Coll.), which was approved by parliament on 6th December 2018. The legislative procedure of the bill was quite extraordinary because it was not submitted as governmental draft bill but as an initiative of members of parliament and thus it allowed to circumvent ordinary discussions and inter-governmental review procedures as well as impact assessment analyses. Furthermore, the haste of legislative procedure was unusual, too. It was passed by the parliament on 6th December 2018, vetoed by the President of the Republic on 12th December 2018 and the Chairman of the National Council called a meeting of the parliament for the very next day – 13th December 2018 in order to override the presidential veto. The act was officially published on 28th December 2018 and entered into force on 1st January 2019. This Act will introduce an additional 2.5% tax from total turnover of the operator of a retail chain. The income of this tax will be a part of the state budged managed by the Ministry of Agriculture and Rural Development. These funds shall be used 'particularly' for the support of the agriculture and food sector. Since the Act contains no preamble and it is silent on its real purpose, the rationale can be found in the explanatory memorandum attached to the draft. From the memorandum, it is clear that the aim of the Act is to redistribute margins and profits of retail chains in favour of Slovak producer and processing companies. There are several groups of objections against this draft. First, the duty will raise prices of food products (hidden additional VAT), second, obscure subsidies for Slovak producers can violate EU internal market rules as it was found in Poland and Hungary regarding similar duty, third, it can reduce wages and investment in the food sector, and finally, the expected beneficial outcome is not described enough and therefore it can be hardly assessed (Vlachynsky, 2018). Taking into account the financial figures of major retail chains in Slovakia, it can be expected that this additional duty will contribute to a substantial drop of profit of these companies, if they do not internalize this duty in prices.[17] Due to exemptions from the scope of

[16] https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=463601 (last visited on 10.03.2019)

[17] Annual financial reports published at www.registeruz.sk (last visited 12.12.2018).

the act it can be considered state aid to undertakings which are not subject to the tax.[18] Although the tax was politically intended to address the fact that food prices in Slovakia are higher than in some other EU countries (16.5% of household costs in Slovakia compared to an EU average of 11%), it did not take into account the impact of the high level of VAT on food products. VAT on food in Slovakia is 20%,[19] 18% in Hungary, 10% in Czechia, Austria or Italy, 7% in Poland or Germany and 5% in the UK) (Brožík, 2018, p. 26–27). Surprisingly, this populist attempt to limit the market power of retail chains through additional tax was not widely supported by the general public. According to a consumer survey only 20% support the additional tax and 70% were against (Brožík, 2018, p. 26).

II. Detailed description of Slovak legislation

1. Privately enforced law

The general rules for fair B2B behaviour are set in Commercial Code in Head V (Articles 41–55d). Competitors exercise the right to freely develop competition amongst them, with the purpose of gaining profit. However, competitors are obliged to comply with the legally binding competition rules and they must not abuse their participation in competition. By abuse of participation on competition, the Commercial Code understands **unfair competition** and unlawful **restrictions of competition**.

The general clause on **unfair competition** regulation is in Article 44 of Commercial Code, which explicitly prohibits any unfair competition.

[18] Only following retail chains are subject to the tax: group of stores using the same or similar logo operated by the same undertaking or group of undertakings mutually connected either personally or via capital shares, which sells food, operates stores in at least 15% of districts (i.e. in 11 districts of Slovakia), at least 25% of turnover is generated by selling food to a final consumer and stores have unified design, common communication and joint marketing activities. It is clear that commercial alliances of undertakings which are not mutually connected via personal or capital bounds are exempted from the tax even if they create retail chain.
Furthermore SMEs, food producers or retail chains connected to food producers by personal or capital bounds and retail chain selling food of single type are exempted, too. Finally, stores located in the less developed districts of Slovakia and serviced by at most 10 employees as well as stores in the villages in which at most 3 stores sell food to final consumers are exempted from calculation of turnover subject to taxation.

[19] Only fresh or chilled meat, fresh milk and butter and bread are subject to decreased 10% VAT.

According to this provision, 'unfair competition' shall mean '*any competitive conduct, which is in contrary to good morals (dobré mravy) and which is able to cause damage to other competitors or consumers, for example: misleading advertising, deceitful description of goods and services, contributing towards mistaken identity, parasitic exploitation of a competitor's reputation, bribery, discrediting, disclosure of business secrets, endangering of health and environment, etc. The list is just exemplificative and not closed to other infringing conduct*'.

A party whose rights have been infringed or threatened by unfair competition, may bring an action against the harming competitor and demand from him to refrain from such conduct, restoration of defective situation, reasonable satisfaction in the form of moral or financial one, or compensation for damages and unjustified enrichment.

The (individual) action shall be submitted to court, whose causal competence is defined in Section 26 of the **Act No. 160/2015 Coll. Civil Dispute Procedure** as amended (hereinafter the 'CDP'),[20] The hearings are public, with exemptions when there is a threat of revealing business secrets of a party or when it is justified by public interest.[21]

Except for cases of parasitic exploitation of a competitor's reputation, bribery, discrediting, disclosure of business secrets, also a **legal person entitled for collective protection** of competitors or consumers can claim against the harming competitor to refrain from such conduct and restoration of defective situation. Such submitting of an action creates a *litispendent barrier*, as the Commercial Code explicitly stipulates,[22] that after initiation of the dispute on these matters or after the final decision in these matters, no actions of any entitled subject are admissible, and at the same time, this provision is not prejudicial to the right of these other persons to join the litigation under the general provisions as interveners. Judgments legally enforceable on these claims are also effective for other beneficiaries.

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[20] According the Article 26 CDP in unfair competition cases a competent court (in first instance) is: District court Bratislava I for the districts of Regional court in Bratislava, Regional court in Trnava and Regional court in Nitra; District court Banská Bystrica for the districts of Regional court in Banská Bystrica, Regional court in Žilina and Regional court in Trenčín; and District court Košice I for the districts of Regional court in Košice and Regional court in Prešov.

[21] According the Article 55 of the Commercial Code public can be excluded from the hearing upon the decision of the court on the request of the party or *ex officio*.

[22] See an Article 54 of the Commercial Code.

Restriction of competition is the subject of the Act on Competition. As restriction of competition falls under publicly enforced law, we will thoroughly analyse the relevant legislation in Section 2 of this part.

However, despite the matter of the restriction of competition being regulated by public law, rules governing actions for damages for infringements of the competition law remain in the private enforcement sector. The relevant legislation is the **Act No. 350/2016 Coll. on certain rules governing actions for damages for infringements of the competition law**, as amended (hereinafter 'ADICL'). This Act represents the national measure for transposition of the Directive 2014/104/EU.[23]

According to Article 3 ADICL any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. The Act counts with presumption of damage caused by a cartel. ADICL significantly simplifies enforcement of the claims of harmed subject by establishing the obligation of the court to respect the enforceable decisions of AMO and a presumption of violation of competition rules when assessing the decision of a competition authority from another Member State (Art. 4); joint and several liability of infringers of competition rules (Art. 6), the right for disclosure of evidence in the file of a competition authority (Art. 11–17). According to the Article 21 ADICL, this Act has the character of *lex specialis* to the Commercial Code, which in the matters of claims for damages for an infringement of competition law, represents *lex generalis*.

The procedure is regulated by above mentioned Civil Dispute Procedure in the same type of process.

2. Publicly enforced law

The legal framework of B2B food supply transactions is covered by the Act on Competition and Act on Unfair Trading Practices.

Act on Competition is focused on the protection of competition and its development to the benefit of consumers. Within its material scope, it covers the conduct and activities of entrepreneurs which limit or may limit competition. Through the general clauses, it explicitly prohibits agreements,

[23] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

decisions of association of undertakings and concerted practices, which have as their object or their effect the restriction of competition (Art. 4) and abuse of dominant position (Art. 8). The uncompetitive behaviour may take form of unfair price or non-pricing conditions, limitation of supplies, discrimination and others. The list of misconducts are in both cases just exemplificative and open.

Alongside the Act on Competition, when the criteria of discernible effect on trade between Member States are met, the **Article 101**[24] **and 102**[25] **of the Treaty on Functioning of the European Union** (hereinafter 'TFEU') are applicable, too.

The enforcement of competition rules established both in Act on Competition and TFEU is entrusted to AMO.[26] By its character, it is an administrative procedure, which is described in more detail in Section IV.

The sanctions for infringement of competition rules are:

- financial fines according the Articles 38–38a of the Act on Competition or Article 23–24 of the Regulation 1/2003,
- ban from participation in public procurement according the Article 38h of the Act on Competition),
- imprisonment according the Article 250 of the Act No. 300/2005 Coll. Criminal Code, as amended.

Act on Unfair Trading Practices is focused on countering unfair trading conditions applied in business relations in the food supply chain. According to Article 4 of the Act on UTP, an agreement between a supplier and buyer on unfair terms is forbidden. The provision in enumerative way defines what practice falls within the term of 'unfair trading practice/condition' (44 practices).[27]

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[24] The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

[25] Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

[26] The competence to act even in European antitrust cases was delimited from European Commission to national competition authorities upon Article 5 of the Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[27] For example the cash performance or non-monetary performance of a participant of business relationship for being included onto the suppliers' list of a customer, compensation of lower profits or margins of the customer compared to planned profits

The compliance with Act on UTP is controlled by the Ministry of Agriculture and Rural Development of the Slovak republic (hereinafter the 'Ministry of Agriculture'). By its character, it is an administrative procedure, described in more detail in Section IV of this chapter.

The sanctions for an infringement of B2B UTP rules may take the following form:

– financial fines according to Article 8 of the Act on UTP,
– imprisonment according to Article 250 of the Act No. 300/2005 Coll. Criminal Code, as amended.

3. Codes of conduct

Furthermore, Act on UTP in Article 5 enables suppliers and buyers to adopt an Ethical Code with the purpose to detail the criteria of honest and transparent business relationships. Such a code is binding for all subjects who accessed to it.

We can find such Codes of Conduct in corporations such as TESCO,[28] BILLA,[29] COOP Jednota,[30] Kaufland,[31] etc.

The sanctions for an infringement of the code of conduct may have form of private ones, such as termination of the contract, claims for damages and reasonable compensation for unjustified enrichments.

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or margins of the customer, carrying out inspections at the expense of the supplier, offering discriminatory business conditions to various suppliers for same performance, inadequate contractual penalties, arranging unrelated obligations.

28 Available at: https://www.tescoplc.com/media/1248/slovakian_code_of_business_conduct_2015.pdf (last visited on 24.10.2018).

29 Available at: https://www.billa.sk/specialfolder/footer/pre-verejnost-a-media/supply-chain-initiative (last visited on 24. 10. 2018).

30 Available at: https://www.coop.sk/files/media/documents/eticky-kodex-coop-jednota-231051734.pdf (last visited on 24.10.2018).

31 Available at: https://spolocnost.kaufland.sk/o-nas/nase-hodnoty/ferove-obchodne-praktiky.html (last visited on 24.10.2018).

III. Nature of infringement and scope of public enforcement

1. *Ratione materiae* of public enforcement

The precise legal nature of prohibited practices is not clearly stipulated in law. Indeed, the Act on UTP prohibits unfair trading practices,[32] so it can appear that they are null and void *ex lege*. However, the Ministry of Agriculture is obliged to impose order to terminate unfair condition (thus they are not void *ex lege*?). This can lead to the conclusion that unfair clauses are not void according to private law and it is prohibited to conclude them by public law only. Moreover, an unfair clause is an administrative offence only for the party that benefits from the clause. If we follow this explanation it can also lead to a situation where the injured party can refuse to agree to terminate an unfair contractual clause and thus expose another party to further sanctions. A comment that this legal construction is a real Catch 22 cannot be avoided. Therefore, a more feasible explanation can be given that an unfair condition is an administrative offence committed by a party that benefits from the clause and the clause is absolutely void in terms of private law. And the duty to terminate the unfair clause is obsolete from the legal point of view, and in fact, the parties can be required merely to terminate enforcement of the clause. Furthermore, the wording of the act is still complicated as regards the unfair condition constituted by the absence of mandatory contractual clauses under Art. 3(1) of the Act, since the wording of the provision is quite broad and the conclusion of a particular contractual provision requires agreement of both parties.

Current legislation contains an enumerative list of prohibited unfair trading practices without any general clause.[33] The list is split into three parts. The first part of the list prohibits any payments or non-pecuniary transfers by a supplier for enumerated transactions.[34] The second part of

[32] Art. 4(1).

[33] Art. 4 of the Act on UTP.

[34] a) enlisting into the registry of suppliers at purchaser,
b) the listing of the supplier's food in the records of the products sold to the purchaser and the payment for the operation of the electronic equipment,
c) time-limited placement of a supplier's food in a purchaser shop,
d) the realization of a business promotion of a purchaser, purchase or investment of a purchaser, mainly in the context of the renewal of an establishment or in the context of the expansion of the purchaser's business network or the construction and operation of the purchaser's clearing or shopping and logistics centers,
e) reimbursement of the lower profit or lower margin of the purchaser in comparison to planned profit or planned margin of the purchaser,

the list prohibits payments made by the supplier to purchaser that are higher than 3% of annual turnover regarding relevant products and the relevant business partner and are provided due to enumerated transactions and activities.[35] Third part contains an incoherent list of different types of clauses and practices.[36] All these practices are prohibited per se without any legal exemptions or possible assessment of proportionality of such

f) promotional actions of the purchaser without consideration of the same value in favor of the supplier,
g) higher than the intended sale of the supplier's food, as assumed by the buyer, with retroactive effect,
h) purchaser's visits to new or prospective suppliers,
i) consumer and market survey performed by purchaser.

[35] a) use of the purchaser's distribution network,
b) business activities of the purchaser aimed at promoting the sale of the supplier's food, in particular gifts, bonuses, rebates and bonuses,
c) business activities of the purchaser aimed to promote the sale of food placed on the market and sold under the purchaser's trademark, in particular gifts, bonuses, rebates and bonuses,
d) placing the food at a specific place in the purchaser's premises,
e) services provided by a third party to support sales and promotion of the purchaser,
f) design related to outdoor presentation and packaging.

[36] a) the conclusion of the contract, which does not contain the information required by law, i.e. (a) terms of purchase, (b) the determination of the volume and type of food placed on the market and the schedule of compliance with the agreed tolerance, (c) how to determine the purchase price, (d) how to reduce the purchase price, (e) the time limit for payment of the purchase price, (f) a kind of service related to business cooperation for other marketing activities associated with food.
b) performing controls at the cost of the supplier, the premises of the supplier by the purchaser or his authorized person, including the requirement to carry out analyses and tests of the food at the supplier's cost,
c) prioritizing the results of inspections carried out at the expense of the purchaser on the safety of the food, over the results of inspections carried out by the State Veterinary and Food Administration of the Slovak Republic,
d) the return of the food to the supplier before or after the date of its consumption or the date of its minimum durability without due cause,
e) the obligation to exchange the food at the expense of the supplier for no legal reason,
f) non-observance of the deadline pursuant to law, i.e. 30 day from obtaining proper invoice, not later than 45 days from delivery,
g) reduction of the agreed price of a food due to payment of a liable sum within the due date,
h) requiring additional pecuniary or non-pecuniary payments after taking the food,
i) without due cause requiring supplier to compensate a sanction imposed by the inspection body to the purchaser,
j) allowing the purchaser to recover a penalty from the supplier for dealing with consumer complaints in the form of a refund for food at the retail price or the

conditions. There are also no exonerating circumstances, such as duress, *mens rea* of other party, etc.

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exchange of a food; this does not apply if the purchaser notifies the supplier in writing the complaint that was the fault of the supplier,

k) immediate termination of a repeat-performance contract without notice without due cause,
l) an additional reduction of the agreed price of the delivered food by the purchaser at the supplier's pain without a specific written agreement on the reason and extent of the reduction,
m) selling food to consumers at a higher price than the agreed price of the food delivered in a particular sale event,
n) unwarranted non-acceptance of a predetermined volume of food placed on the market and sold under the purchaser's brand,
o) conditioning the sale of a foodstuff by the supplier by producing a food under the purchaser's trade-mark, except where the purchaser is involved in the development of a food,
p) a refusal to state the name and address of the supplier on the packaging a foodstuff marketed under the purchaser's trade name, if supplier makes such request,
q) retroactive cash payments to promotional activities of the purchaser that have taken place in the past and have not been the subject of a contractual relationship,
r) agreeing a different date when the purchaser becomes the owner of the food, such as the date of its receipt by the purchaser, and together with the transfer of the right of ownership, also passes to the purchaser the risk of damage to the goods,
s) the imposition of several contractual fines by one purchaser for breach of the same contractual obligation by the supplier,
t) the negotiation of a contractual fine, the amount of which is manifestly inappropriate having regard to the value and significance of the breach of contract, the fulfilment of which is secured by that contractual fine,
u) selling the food to the final consumer at a lower unit price than he has paid for the supply of the same type of food to the supplier, except when (1) sale of a foodstuff whose reason is the cancellation of the shop, the termination or change of business, (2) selling food after three quarters of consumption period or minimum shelf-life, (3) selling seasonal food, (4) sale of food with deformed packaging,
v) commitment in a contract with a supplier which is not related to the subject of the contract,
w) the application of unfairly advantageous trading conditions or the application of discriminatory business conditions to individual suppliers for the same performance,
x) requiring the placing on the market of a foodstuff the quantity and kind of which are contractually agreed between the parties to the business relationship at a price lower than the purchase price at the time of signing the purchase contract,
y) obtaining or seeking to obtain any benefit or payment from a supplier that does not correspond to any actual commercial service provided or is manifestly inappropriate in relation to the value of the service provided,
z) requesting a guaranteed price for more than three months,
aa) requiring the return of packaging and waste material, which does not come from the supplier's goods,
ab) assignment of the claim conditional subject to the consent of the debtor,
ac) requirement for advance payment of future contractual fines.

Also, no further conditions for the application of prohibition as well as commitment of administrative defence are required, that is there are no thresholds for market power or market share. General public interest is not assessed. Parties also cannot claim reasonableness of the clause due to a specific market situation, previous performance of particular parties or the character of the product. There is no type of *de minimis* exemption. Thus, the declared aim of the law is not to counter the bargaining power and avoid its abuse but merely to outlaw certain practices that the legislator considers unfair. Indeed, it is highly probable that the majority of prohibited unfair practices could have been concluded only due to pressure of contractual party with stronger bargaining power.

It can be concluded that the Slovak legislative framework (current as well as expected) provides much more protectionist approach and intervenes more into B2B relations in the food sector than it could be required by the current 'Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain'[37] if adopted.[38] Since the current law on UTPs as well as the vetoed bill contain a list of unfair trade practices, it is easy to compare current status of prospective harmonization:

The 'black list':

- a buyer makes payment later than 30 days (simplified): current Act on UTP – 30 day after invoice, not longer than 45 after delivery [§ 3(2) UTP], new Act on UTP– 20 days after invoice, not longer than 30 after delivery, for perishable foods – 10 days after invoice, not longer than 15 day after delivery [§3(5)f)];
- a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products: both current Act on UTP and the new bill prohibit not honouring all orders, not only regarding perishable goods;
- a buyer unilaterally and retroactively changes the terms of the supply agreement concerning the frequency, timing or volume of the supply or delivery, the quality standards or the prices of the food products: all these elements must be enshrined in the agreement, otherwise such agreement itself is considered an UTP;
- a supplier pays for the waste of food products that occurs on the buyer's premises and that is not caused by the negligence or fault of the supplier: not specifically included into Slovak legislation.

37 COM/2018/0173 final – 2018/082 (COD).

38 For detailed analysis of the draft directive see e.g. Piszcz, 2018.

The 'grey list' (relevant provisions of the current Act on UTP and the new ones are similar):
- a buyer returns unsold food products to a supplier: prohibited *per se*;
- a buyer charges a supplier payment as a condition for the stocking, displaying or listing food products of the supplier: prohibited *per se*;
- a supplier pays for the promotion of food products sold by the buyer: prohibited *per se* if it is more that 3% of the value of food sold by supplier to buyer in one year;
- a supplier pays for the marketing of food products by the buyer: prohibited *per se* if it is more that 3% of the value of food sold by supplier to buyer in one year.

2. *Ratione personae* of public enforcement

The Act on UTP provides a comprehensive legal definition of persons covered by the scope of the act: the purchaser and supplier.[39] A supplier is a party of a trade relationship that operates a food business and provides goods or services to a purchaser. A purchaser is a party to trade that is a food business operator and buys goods and services from suppliers as well as a legal person controlling or controlled by the food business operator. Definition of 'food business operator' is taken from Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety,[40] i.e. person responsible for '*undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food*'. From the point of *ratione personae* the Act on UTP is applicable to all stages of food processing and distribution and to all operators, notwithstanding their position on the market or the mode of business.

IV. The relationship between public enforcement law and other acts

UTPs are practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing. UTPs are typically imposed in a situation of an imbalance between a stronger party and a weaker

[39] Art. 2.

[40] OJ L 031, 01.02.2002, p. 1.

one and can exist from any side of the B2B relationship and at any stage in the supply chain. From the European Competition Network's report on competition law enforcement in the food sector,[41] we can conclude that competition problems were detected at all levels of the food supply chain. The most vulnerable part of supply chain is the transformative part (processing and production). Horizontal cartels have the forms of price fixing, market and customer sharing and exchanges of confidential information. Vertical anticompetitive cartels are usually price-related and often contain exclusive purchasing agreements that restrict the freedom of the direct customer to deal with other suppliers. Abuse of dominant position mainly involves strategies to foreclosure competitors, such as exclusivity obligations, minimum purchasing obligations, tying and refusals to supply, but also some exploitative abuses, such as unjustified contractual obligations.

The main problem of insufficiency of competition regulations is that they require the element of 'appreciable effect' of their behaviour on the relevant market; or that they accept exemptions from the cartel prohibition, or, in some cases, respect justified objections of a dominant undertaking, which save it from the application of competition rules on possible uncompetitive behaviour. Therefore, Act on UTP provides, or intends to provide, 'a safety net' to catch all unfair practices of undertaking in this specific sector, without the necessity of proving the market share and (negative) impact on the relevant market. The weakness of this Act is its lack of flexibility. The absence of a general clause enables an unfair entrepreneur to escape from the application of the Act, when imposing unfair conditions other than recognised in Act on UTP on his business partner.

Furthermore, Act on UTP, when considering the possibility of voluntary agreement of an unfair condition in B2B relations, is stricter than the provisions in the Civil Code[42] covering the UTP in consumer protection, which enables UTPs in consumer agreements in case when it was individually negotiated. In this relation, Act No. 250/2007 Coll. on Consumer Protection in Article 3(3) stipulates, that every consumer has the right to be protected against unfair practices in consumer agreements, but in details is referring to the Civil Code. Therefore, in Slovakia, business entities in food supply chain are more protected against unfair practices than consumers.

General legal coverage can also be found in Article 265 of the Commercial Code which stipulates that exercise of the law which is contrary to fair

41 ECN (2012). Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector. Retrieved from: http://ec.europa.eu/competition/ecn/food_report_en.pdf (last visited on 31.10.2018).

42 Article 53 (1) of the Act No. 40/1964 Coll. Civil Code, as amended.

trade principles does not benefit from legal protection; and in Article 39 of the Civil Code, which stipulates that a legal act (of a person) which in its content or purpose is contrary to the law or is circumventing it, or contravenes good faith (*bona fide – dobrá viera*), is void.

Questions may arise when considering the consequences of a void agreement on UTPs in B2B relations. In B2B relations, a certain level of business knowledge and prudence of undertakings shall be presumed. Therefore, if the entrepreneur knows that he is concluding a UTP, or with regard to all circumstances he would know it, exclusion from the right to claim damages shall be applied according the Article 268 of the Commercial Code.[43]

V. Public enforcement institution and proceedings

1. Institution in charge of public enforcement

The abuse of bargaining power in the food supply chain can be prosecuted by several authorities. One of the most significant is the AMO.[44]

The Antimonopoly Office is established pursuant to the Act on Competition. It is a central authority of state administration for the area of protection and support of competition.[45] It also fulfils tasks of a national competition authority pursuant to Regulation 1/2003 and Regulation 139/2004.[46]

The head of the Antimonopoly Office is the president. He is appointed by the President of the Slovak Republic based on a nomination of the Slovak government. His or her term is for five years, whereas he or she may be appointed for maximum of two consecutive terms. The president shall be removed from office by the President of the Slovak Republic in case of an effective conviction for an intentional crime or for a negligent crime which was in direct connection with the exercise of his or her function; he

[43] Who caused the invalidity of a legal act, shall be obliged to compensate the person to whom the act was intended, unless such person knew of the nullity of the legal act.

[44] Competition law issues may be prosecuted by the European Commission based on Regulation 1/2003, however, bearing in mind the character of this report as a national report, we will focus on national public enforcement mechanisms, i.e. national public authorities.

[45] Section 14 para. 1 of Act on Competition.

[46] Section 14 para. 2 of Act on Competition. A parallel application of European and Slovak competition rules is possible; Kalesná, 2012, p. 9.

or she was effectively deprived for his or her legal capacity to act; or he or she has commenced a function which is incompatible[47] with the function of president of the Antimonopoly Office.[48]

The president of the Antimonopoly Office is at the same time the president of the Council of the Office dealing with appeals against first-instance decisions of the Antimonopoly Office. The Council consists of six members appointed and dismissed[49] by the Slovak government. The President of the Antimonopoly Office nominates at least three persons for each position of member of the Council. All the members of the Council must have a university degree, whereas at least two members shall be lawyers and at least two members shall be economists. The term of a member of the Council is five years.[50]

The vice-president of the Antimonopoly Office is appointed and removed from office by the president of the Antimonopoly Office.[51] Powers of the vice-president are oriented mainly towards first-instance proceedings.[52]

Act on Competition gives wide powers to the Antimonopoly Office. Among others, the Antimonopoly Office is entitled to investigate whether there is an infringement of competition law, to request information from companies and from other legal and natural persons, to carry out inspections on business premises, and, with a prior judicial approval, also non-business premises.[53] These powers are considered to be strong, however, their exercise is limited by fundamental rights and freedoms, such as protection against self-incrimination, legal professional privilege, right to privacy (Patakyová, 2017, pp. 55–63, 57).

As far as the independence of the Antimonopoly Office is concerned, there are several guarantees for the independence of this authority, such as appointment of the president of the Antimonopoly Office by the President of the Slovak Republic, clearly stated reasons for his or her removal from office, existence of a collective body, the Council, to deal with appeals (Zemanovičová, 2017, pp. 48–54, 49, 50). Nevertheless, it is important to

47 Such functions are stated in Constitutional Act no. 119/1995 Coll. on prevention of conflicts of interests in exercise of functions of constitutional officials and higher state functionaries.

48 Section 16 para. 3 of Act on Competition.

49 The Slovak government shall remove a member of the Council from function for the same reasons as the President of the Slovak Republic shall remove the president of the AO from function. Section 21 para. 3 of Act on Competition.

50 Section 18 paras 1 and 3; section 19 of Act on Competition.

51 Section 15 para. 3 of Act on Competition.

52 Section 15 para. 3; section 22a para. 2 of Act on Competition.

53 Sections 22 and 22a of Act on Competition.

state that political influence cannot be excluded. For instance, there are no requirements for a transparent selection procedure for the president of the Antimonopoly Office. There are no requirements for his or her professional experience and personal integrity. He or she is, in fact, nominated based on an agreement of political parties. The political influence on the Antimonopoly Office may also arise from the fact that the person can be re-elected for the position of the president of the Antimonopoly Office (Zemanovičová, 2017, pp. 48–54, 49, 50). Therefore, such person can be forced to behave in a manner beneficial for political parties in order to be re-nominated by them.

In relation to the Council, similar objections may be raised. There is no transparent selection procedure for its members. Although there are requirements for members of the Council regarding their education, there are no specific requirements for professional experience in the field of competition law (Zemanovičová, 2017, p. 50).

To conclude, the Antimonopoly Office is an independent authority, nevertheless, there are certain ways how politicians may influence the authority.

Apart from the national competition authority, the abuse of bargaining power in the food supply chain is under supervision of the Ministry of Agriculture. Pursuant to **Act on UTP**, unfair conditions, as a result of *de facto* abuse of bargaining power, are controlled by the Ministry of Agriculture. The Ministry carries out inspections in relation to both suppliers and buyers. An inspection may be initiated by the Ministry of Agriculture itself, or it can be based on a complain of a third party. The inspection is focused on data, information, documents and papers, from which it is possible to find out the wording and realization of unfair conditions between the parties of a trade relation. The inspection is performed by an employee of the Ministry of Agriculture.[54]

In relation to the independence of the Ministry of Agriculture, it is apparent that the Minister is part of the government, therefore, the Ministry of Agriculture is under direct political influence. However, it shall be stressed that standard safeguards against the abuse of power apply, that is the government is under control of parliament, the National Control Office, the Public Defender of Rights, courts, public prosecutors etc.

[54] Section 6 of Act on Unfair Conditions.

2. Type and principles of proceedings

In general, judicial review of administrative decisions is exercised by general courts. There are no specialized administrative courts in the Slovak Republic, however, there is a partial specialization within general courts (Baricová, Fečík and Filová, 2018, p. 11). Within the Supreme Court of the Slovak Republic and within the eight regional courts, administrative cases are heard by judges from administrative collegium.

Pursuant to Article 127 of the Constitutional Act No. 460/1992 Coll. as amended (hereinafter the 'Slovak Constitution'), the Constitutional Court of the Slovak Republic (hereinafter the 'Constitutional Court'), hears complains of individuals[55] if they claim that their fundamental rights and freedoms or human rights and fundamental freedoms established in international treaties, ratified by the Slovak Republic and announced in a manner prescribed by acts of law, unless there is another court which is competent to deal with the matter. The Constitutional Court offers *ultima ratio* protection and it usually does not rule on the merits of the case, since that is a task for general courts. Therefore, the Constitutional Court is empowered to abolish the decision at stake, to return the matter to the institution which issued the decision, to prohibit further infringing of fundamental rights and freedoms and to, if possible, reinstate the status before the infringement.[56]

The Antimonopoly Office is part of state administration, it possesses its own legal capacity. Proceedings before the Antimonopoly Office are of administrative nature, whereas general rules on administrative proceedings apply (Blažo, 2012, p. 159). Decisions issued by the Antimonopoly Office may be challenged before the Council of the Office. Both the first instance and the appeal type of decisions are administrative decisions and they are part of the executive power.

In relation to administrative proceedings before the Antimonopoly Office, the Council of the Office serves as the appeal body against decisions of the Antimonopoly Office in the first instance. If the person concerned with the decision is not satisfied with the outcome of the appeal procedure

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55 The Antimonopoly Office is not entitled to lodge a complaint as an individual. See Decision of the Constitutional Court of the Slovak Republic of 5 May 2004, No. IV. ÚS 149/04-17.

56 The particularities of proceedings before the Constitutional Court are regulated by Act No. 38/1993 Coll. on organisation of the Constitutional Court of the Slovak republic, on proceedings before it and on status of its judges, as amended. The individual complaints are regulated by Section 49 et seq. of the Act.

held by the Council of the Office, the person can challenge the decision of the Council of the Office before national courts. The conditions for active legitimation for such action are quite liberal. According to **Act No. 162/2015 Coll. Administrative Judicial Code, as amended** (hereinafter the 'AJC'), administrative action can be lodged by any person who, as a party of the administrative proceedings, claims to be affected by the administrative decision.[57] The administrative action shall be lodged within two months after the announcement of the decision against which the action is lodged. The administrative action has no suspensive effect, unless stated otherwise by an act of law or decided by court for the case at stake.

In relation to Ministry of Agriculture, it may impose fines for agreeing an unfair condition. Such fines are of administrative nature. They are imposed by decisions issued pursuant **to Act No. 71/1967 Coll. on Administrative Procedure as amended** (hereinafter the 'Act on Administrative Procedure').[58] Decisions of the Ministry of Agriculture as a central authority of state administration may be appealed to the Minister of the Ministry of Agriculture within 15 days. The Minister's appeal decisions are based on a draft of a specialized appeal council of the Ministry of Agriculture.

3. Fines and other sanctions

The Antimonopoly Office is entrusted with considerable powers. In general, it is empowered to issue a decision by which it declares certain activity of an entrepreneur to be prohibited by the Act on Competition or by Articles 101 and 102 TFEU. Within such decision, the Antimonopoly Office may also impose an obligation to bring the prohibited activity to an end by imposing an obligation to refrain from such activity and to repair the unlawful situation which was created.[59] If an unfair trade practice constitutes an infringement of competition rules, the case is within a competence of the Antimonopoly Office.

According to the Act on Competition, the Antimonopoly Office is also entitled to put heavy fines on entrepreneurs. For a breach of substantive competition law or for an incompliance with a decision of the Antimonopoly Office, it is entitled to fine the entrepreneur at stake

57 Section 178 para 1 of AJC.
58 Section 8 para 9 of Act on Unfair Conditions.
59 Section 22 para. 1 letter d of Act on Competition.

up to 10% of its turnover.[60] The Antimonopoly Office shall take into account severity and length of the infringement. Within the assessment of severity, the Antimonopoly Office considers character of the infringement, its influence on the market and size of the market.[61] This indicates that, if the Antimonopoly Office imposes a fine for abuse of bargaining power in food supply chain, it will probably impose higher fines due to its possible negative influence on the market. The severity may be mitigated by size of the market, mainly the geographic area[62] which was touched by the infringement, since many of food producers are of local character. On the other hand, it is possible that the practice at stake would be of national, or even supranational nature.

Among aggravating factors of antitrust infringement, it is possible to mention the particular activity of the entrepreneur. If the entrepreneur used threats, repressions, economic or other pressure in order to force another entrepreneur to participation in the infringement, such activity would be considered aggravating factor.[63]

A decision of the Antimonopoly Office shall be executed within five years after the period for compliance with the imposed obligation lapsed.[64]

In relation to unfair conditions, the Ministry of Agriculture is entitled to fine a person who agreed on an unfair condition to his or her benefit. The amount of fine varies from EUR 1,000 to 300,000. Together with the fine, the Ministry of Agriculture shall put a time limit for the removal of the unfair condition. If the person does not remove the unfair condition, the Ministry of Agriculture shall apply the fine repeatedly. If the obligation is infringed repeatedly within one year, the Ministry of Agriculture may impose a fine up to 600,000 EUR, even repeatedly.[65]

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60 Section 38 para. 1 of Act on Competition. The Antimonopoly Office has also issued Guidelines on the procedure for setting the fines in cases for abuse of dominant position and agreements restricting competition, from 1 September 2018. Available at: https://www.antimon.gov.sk/data/files/963_metodicky-pokyn-o-postupe-pri-urcovani-pokut_1-9-2018.pdf (last visited on 31.10.2018).

61 Section 38 para 3 of Act on Competition.

62 See p. 15 of Guidelines on the procedure for setting the fines in cases for abuse of dominant position and agreements restricting competition, from 1 September 2018. Available at: https://www.antimon.gov.sk/data/files/963_metodicky-pokyn-o-postupe-pri-urcovani-pokut_1-9-2018.pdf (last visited on 31.10.2018).

63 *Ibidem*, p. 30.

64 Section 36 of Act on Competition.

65 Section 8 of Act on Unfair Conditions.

The time limit for fining the infringement is one year after the Ministry of Agriculture got knowledge about the infringement, but no later than three years after the infringement took place.

There is no statutory relationship between the powers of the Antimonopoly Office and the Ministry of Agriculture in cases when unfair conditions constitute competition infringement. Taking into account the level of the fines and investigation powers of the Antimonopoly Office compared to those of the Ministry of Agriculture we can assume that a competition infringement is considered more serious delict than a purely unfair condition. In such situation general rules of penal law can be applicable to solve the conflict and more serious delict 'consumes' the less serious one.

4. Key enforcement decisions and case law

The Act on UTP entered into force on January 1st, 2013. From January 2013 till June 2018, the Ministry of Agriculture issued 64 decisions which covered 105 infringements of the Article 4 of the Act on UTP, which became final and came into force. As much as 36% of infringements were related to delays in payments of purchase price (Section 4.f); 23% were related to requirements to additional financial or non-financial benefits after food acceptance price (Section 4.h); 15% were related to the supplier's payments of amount higher than 3% from his annual sales food delivered to a particular customer in calendar year, in which the payment was realized, for the customer's business activities focused on the support of sales of the supplier's food, gifts, rebates and such (Section 3.b); 8% were related to the supplier's payments for promotional actions of the customer without counterfeiting of the same value in favour of the supplier (Section 2.f). Other infringements appeared less than 3 times. Total amount of fines imposed by Ministry of Agriculture was EUR 2.9 million.

Actual relevant case law comprises three decisions of the Supreme Court of the Slovak Republic (hereinafter the 'Supreme Court') related to Act on UTP.[66] In all three cases, the claimant was Kaufland, and the subject of the case was not the nullity of the decision of the Ministry of Agriculture, but the questions related to legality of inspections. In all three cases the Supreme Court stated that the inspections of Ministry of Agriculture were carried out in compliance with the legal order.

[66] Decision of Supreme Court of the SR No. 10 Sžz/13/2014 of 15 July 2015 (Kaufland 1), Decision of Supreme Court of the SR No. 5 Sžo/48/2016 of 28 February 2017 (Kaufland 2), Decision of Supreme Court of the SR No. 10 Sžo/32/2016 of 31 May 2017 (Kaufland 3).

VI. Conclusions

Private-law regulation of unfair trading practices as well as competition law are integral and consistent part of Slovak legal order that is not subject to major and substantial changes. On the other hand, legislation on B2B unfair trading practices is one of items of political agenda and is heavily influenced by an ideological approach. Although public-law surveillance and enforcement is performed by purely political body, fortunately the current wording of the Act on UTP do not provide substantial margin of appreciation to the Ministry of Agriculture regarding definition of unfair trading practices themselves.

It is no doubt that prohibition of certain trading practices is aimed at the elimination of the abuse of bargaining power. However, practices contained in the enumerative list are, on the one hand, considered *per se* unfair practices in other sectors than food sector, and on the other they are prohibited notwithstanding the actual bargaining power of a retail chain. From the point of legal purity, does it mean that such list of unfair practices in the food sector can be considered fair in other sectors (or at least not unfair)? If not, they are covered by general rules on unfair practices under private law. Thus, it can be much more suitable to describe practices on the list as a list of unfair practices that constitute an administrative offence punishable by fine. Indeed, they will be void *ex lege* due to their illegality and can be considered *lex specialis* to the general clause enshrined in the Commercial Code.

Moreover, it appears to be quite easy to escape from the prohibition set by rigidly defined list of prohibited unfair clauses and practices, but, on the other hand, this rigid list does not allow the political body for disproportionate intervention on the market. Hence if there is a trend for a broader general clause, independent or, at least, semi-independent body (such as the AMO) should be empowered to enforce such rules.

Finally, in must be repeated that the basic rationale of legislation dealing with unfair trading practices is seen as a deterrent against such actions for relatively strong economic actors. The distance between the definition of abuse of market power and abuse of a dominant position is not big. The only difference is locked in the notions of ‘dominant position’ and ‘economic power’. Therefore, maybe there is scope for reconsideration of the definition of ‘dominant position’ and collective dominance of an oligopoly and such approach can allow enforcement against new practices with a flexible and well-developed body of law rather than *ad hoc* legislation.

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Summary

Unfair trading practices and measures to counter them have a long history in European economic and legal development. Only a fraction of such practices are captured under the public enforcement of competition law, which, by definition, focuses on firms able to impose UTPs because of their monopolistic or dominant position. Similarly, some vertical agreements between companies and their smaller partners may contain UTP-like clauses, which could violate prohibitions on collusive behaviour regardless of the size of the firms involved.

UTPs which fall below the radar of competition authorities are mostly dealt with through private enforcement under civil codes or specialised legislation in many European countries, including the new members from CEE. Laws in this area often evolve around issues of 'good morals' in business. In fact, the national reviews in this book show specific clauses in private and public law dealing with UTPs referring to 'good morals', variably described as good or fair commercial practices. Disputes about what constitutes a breach of such 'good behaviour' between firms arising from contract law are commonplace and seem to be handled more or less efficiently by courts without the need for massive public intervention. This reflects the general view, often enshrined in constitutional or common law systems in Europe, that freedom to contract in business-to-business relations is an essential tenet of market economy and underlines policymaking focus on competition and efficiency.

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Since the early days of the European Union, however, one sector of the economy was perceived by many European governments as partially exempt from this approach. Agricultural production and farming have enjoyed special status for historical, political and cultural reasons. The prevalence of fragmented farming and the awareness that food security was paramount to societies ravaged by World War Two meant that in many countries the level of state intervention was quite significant. It was reflected in the EU's decision to launch Common Agricultural Policy in 1962, a vast and expensive system of subsidizing and supporting farmers and rural communities to ensure they could adapt well to the single European market. CAP goals are explicit in stating that they seek to 'safeguard European Union farmers to make a reasonable living' and ensure 'a stable supply of affordable food'.[1]

European food processing and retail have for decades been nearly as fragmented and local as farming. The emergence of the single European market, advances in logistics, transport and retail led to gradual consolidation of these sectors and the emergence of large food processing companies and retail chains. The growing clout of retail networks was a boon to consumers but it also put competitive pressure on producers, particularly smaller ones. The specific features of farming products – such as their seasonality and short shelf-life, meant procurement and ability to reach the market became even more essential than before.

The disparity of economic and market power between retail networks, large processing firms and suppliers has resulted in a surge in UTPs, resulting in complaints from farmers and small producers in many European countries, especially those with a huge farm sector. This in turn led to enactment of legal measures against the 'abuse of bargaining power' by retail chains and huge food processing companies in a number of countries since the 1960s. As discussed in the chapter on unfair trading practices in selected western EU member states, different models were adopted, with some countries choosing fairly intrusive public enforcement against UTPs, while others deciding on a more stand-back, private law provisions. Some countries, supported by industry organisations and associations, chose the path of greater self-regulation and 'codes of best practices' adopted by all participants in the food supply chain.

As this book amply demonstrates, the issue of UTPs in the food supply chain has been a hot topic also in CEE countries. The eight national reports clearly indicate that in CEE there is a trend towards greater public

[1] https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en (last visited on 10.03.2019).

intervention and enforcement against UTPs in the food supply chain. In some countries this trend seems to respond to the growing bargaining power of retailers, partly resulting from greater concentration. Whereas as a rule, food production seems very fragmented and allocated to multiple family farms and other SMEs (Bulgaria, Croatia, Czech Republic, Hungary, Poland, Slovakia; but see Estonia), food processing is less fragmented (Bulgaria, Czech Republic, Poland) and in the food distribution sector, in particular the retail industry, a dynamic increase in concentration can be observed (Estonia, Croatia, Slovakia, Czech Republic). At the same time, data presented in the reports shows it is impossible to talk about monopolization of this industry in any country. On the contrary, the reports show the existence of robust competition among retailers to the benefit of consumers. The reports indicate that concern about imported food and foreign owned retail networks is often a key political argument to introduce UTPs, although this may be problematic from the point of view of the single market.

The reports show that like in the case of their western neighbours, individual CEE countries took different approaches to UTPs, depending on local legal, economic and cultural factors.[2] They are a heterogeneous group that includes large food producers such as Poland and much smaller ones such as Slovakia or Estonia. Interestingly, among them there are countries which only recently decided to develop their legal frameworks to combat UTPs irrespective of the on-going legislative process at the EU level (Poland, Slovakia) and more distanced ones. For example Estonia has considered but not introduced any publicly enforced law against UTPs, awaiting the EU directive. Some countries have their publicly enforced laws against UTPs for quite a long time (Slovakia from 2003, Hungary, Czech Republic and Lithuania from 2009), whereas others developed them more recently (in Bulgaria – 2015, in Poland – 2016, in Croatia – 2017). It is worth adding that some countries have sectoral publicly enforced laws against UTPs (Croatia, Czech Republic, Hungary, Lithuania, Poland, Slovakia), whereas the others do not limit them to food supply chains.

Due to the significant role of some national legal frameworks in legal practice, there is a growing number of administrative decisions regarding UTPs in some countries (17 in Bulgaria in 2016–2018, 50 in Hungary in 2016–2017, 64 in Slovakia in 2013–2018), whereas others have hardly seen many such decisions (Czech Republic, Lithuania, Poland, Croatia).

[2] Certainly, codes of best practices are not in the center of political discussions and public attention in CEE countries, even in Estonia.

No wonder that some rapporteurs could not see further considerable potential in their national publicly enforced laws and have interpreted this situation as under-enforcement (Lithuania, Poland).

The overview provided by the reports shows in detail the divergence in the treatment of equivalent unfair trading practices. At the same time, the reports demonstrate that some UTPs seem quite common in all jurisdictions. They include late payments for delivery, return of perishable goods without loss sharing, or 'slotting fees' not justified by equivalent service. A common argument for more strict and publicly driven enforcement against such practices is the 'fear factor' – an observed phenomenon that some suppliers fear to defend their interests in court based on private UTP laws[3] because this may lead to exclusion from the marketplace in retaliation. It is discussed in the reports from Croatia, Estonia, Poland and Lithuania. The latter is even trying to equip the existing system with a legal framework for the liability of retail chains for retaliatory actions against suppliers.

The national reports also show, however, how difficult it is to construct legal basis of enforcement. Neither closed 'black lists' of prohibited contractual terms (Croatia, Hungary, Lithuania, Slovakia) nor open-ended prohibitions based on 'good morals' (Czech Republic, Bulgaria, Poland), accompanied by exemplifications of prohibited practices, seem to satisfy criticism that they allow government agencies or competition authorities arbitrary interventions, limiting companies' freedom to contract and pursue their business interests. At the same time, the first approach has received a great deal of criticism for the lack of flexibility (Slovakia), whereas general clauses have been considered flexible (Poland).

Several reports point out that the interaction with competition law can be confusing. Although the concept of 'excessive bargaining power' may be constructed as a lower threshold of 'dominance', the basic aim of competition law is to protect the competitive process as a driver of efficiency. In such a model, monopolies or collusions lead to higher prices and therefore reduce efficiency and consumer welfare. In the food supply chain, however, an abuse of excessive bargaining power may result in lower prices and does not lead to a reduction of competition. There is a glaring difficulty in defining 'excessive bargaining power' (however named in individual countries, e.g. 'superior bargaining position',[4] 'significant market

[3] All CEE countries included in this publication have private UTP laws, either in Civil Codes (Czech Republic, Estonia, Lithuania, Poland), provisions on obligations (Bulgaria, Estonia), provisions on payment periods (Croatia, Hungary, Poland), Commercial Code (Slovakia) and/or specific provisions against unfair competition (Poland).

[4] Bulgaria.

power',[5] 'contractual advantage'[6]) of companies in the food supply chain or even economic disparity justifying intervention. Examples of the Czech Republic and Poland seem particularly relevant to illustrate this. Following the difficulties with the application of the relative concept of significant market power by the enforcement authority, the Czech legislature replaced it with the absolute concept of significant market power related to the market structure, barriers to entry and financial power.[7] This concept is accompanied, however, with a rebuttable presumption[8] of significant market power dependent on net turnover in the sales of food and related services in the territory of the country.[9] The Polish law, in its original version, defined the 'contractual advantage' of a party by a significant disparity in economic potential and the lack of sufficient and actual opportunities of the weaker party to trade with other potential partners. Among the reasons for the deletion of the second criterion, and therefore, the simplification of the concept, was the facilitation of administrative proceedings, alongside the legislators' desire to protect the weaker market participants.

National reports indicate that public enforcement against UTPs in the food supply chain actually serves to protect 'fairness' in B2B relations rather than efficiency and consumer welfare as such. This does not mean that such a goal is not legitimate on economic, social or food security grounds. In fact, a few national reports seem to demonstrate public interest in trying to ensure fairness in business relations in the food supply chain (Hungary, Poland, but see Slovakia).

The reports analyse the issue of economic agents covered by the law (*ratione personae* of legal provisions), that is who bears the legal responsibility for meeting requirements regarding fair trading practices and who is protected against UTPs. The most popular solution in CEE countries is 'one-sided' protection, that is the protection of suppliers against the buyers (Croatia, Czech Republic, Hungary, Lithuania, Slovakia). 'Two-sided' protection of both suppliers and buyers have been introduced in Bulgaria and Poland. In none of the countries the protection is limited to SMEs. There are only two examples of legal expressions that mark the threshold between who is subject to the protection from the UTPs and who is not.

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5 Czech Republic, Lithuania.

6 Poland.

7 Quite paradoxically, in practice it is being slightly shifted now to a more individualised (subjective) concept by the enforcement authority.

8 See also the Croatian presumption.

9 Under Lithuanian law, the concept of significant market power is tied to the sales area and aggregate income.

Till December 2018, Poland had a *de minimis* rule excluding the smallest traders from the scope of protection (and, at the same time, the smallest traders from the prohibition), which received well-deserved criticism in many sources. On the other hand, since May 2016, in Lithuania suppliers whose aggregate income during the last financial year exceeds EUR 40 million do not have access to the protection from unfair practices of retailers, which is considered more balanced than before.

The reports describe the institutional ('technical') design of the public UTP law enforcement and provide insights into what type of enforcement authority has been chosen by a particular national legislature. In the majority of countries the interaction of laws against UTPs with competition law is noticeable and, as a consequence of it, competition authorities are entrusted also with the powers to investigate cases as well as to take enforcement decisions concerning UTPs (Bulgaria, Croatia, Czech Republic, Lithuania, Poland). The choice of selecting other agencies is rarer (in Hungary – National Food Chain Safety Office supervised by the Ministry of Agriculture, in Slovakia – Ministry of Agriculture and Rural Development, in Lithuania – Agency for Development of Agricultural Business and Market and State Agency of Food and Veterinary in the area of sectoral prohibition of unfair activities of business entities buying-selling raw milk and trading in dairy products). Some enforcement authorities are also equipped not only with the powers to investigate cases and to take enforcement decisions, but also with soft enforcement tools. For instance, the Polish authority can send to buyers and suppliers non-binding requests to provide all necessary information regarding prohibited practices. Among the approaches proposed by drafters there is also the Bulgarian proposal regarding NCA's assessments of at least general terms and conditions of all undertakings with aggregate annual turnover of more than EUR 25 million, which would be part of its advocacy powers. The agency would propose amendments to scrutinised general terms and conditions as a means of gaining compliance without formal proceedings.

The discussion of UTPs cannot take place without considering procedure, therefore the reports also delve into the issues of proceedings. While quite homogenous in selecting the rules of administrative procedure for enforcement, they are initiated either only *ex officio* (Czech Republic, Poland), which does not exclude the possibility of informing the agency about infringements, or, alternatively, at the request or *ex officio* (Bulgaria, Croatia, Hungary, Lithuania). In all the countries included in the reports proceedings can be concluded with infringement decisions, including the imposition of fine. However, only some of them provide for the possibility to adopt commitment decisions (Croatia, Czech Republic, Hungary, Poland).

The reports present national laws offering a range of options from which the most appropriate sanction can be selected, including fines for infringements of substantive rules and other sanctions. National legal frameworks provide for maximum fines stipulated as fixed amounts (in Lithuania up to EUR 120,000; in Croatia several levels of maximum fines dependent on the gravity of infringement and whether the infringer is a natural or legal person, with the highest fine of up to EUR 666,666; in Slovakia from EUR 1,000 to 300,000 and the fine might even be of up to 600,000 in case of recidivism) or tied to the annual turnover (in Poland up to 3%), sometimes combined with a fixed minimum or maximum amount (in Bulgaria up to 10% not less than EUR 5,000; in the Czech Republic up to 10% or EUR 400,000; in Hungary not more than 10% between EUR 300 and 1,5 million and in case of recidivism between EUR 1,500 and 6 million). The definition of turnover may differ and be related to either products of a type concerned by the infringement (Bulgaria) or the total turnover (Poland, Czech Republic, Hungary). Fines for procedural infringements found to prevent regulatory bodies to conduct their activities are provided for (Croatia, Hungary, Lithuania, Poland). Also periodic penalty payments in case of delay in compliance with a decision are provided for (in Poland of up to EUR 10,000 per day, in Lithuania of EUR 300 per day). As a rule, enforcement officials have some discretion to calculate fines, taking into account mitigating and aggravating factors. Only the Lithuanian periodic penalty payments are sanctions without possible mitigation by the enforcement agency. All this is aimed to ensure compliance with the legal provisions and adopted decisions.

The administrative agency is the prosecutor, judge and the final authority in UTP cases at the same time. However, fines and other sanctions cannot be discussed without involving questions concerning the protection against the wrongful imposition of such sanctions. National provisions of some countries provide for an oral hearing (Croatia) or the obligation to deliver the statement of objection (Lithuania, Czech Republic). Eventually, decisions may be appealed to administrative second instance (Chairman of the NCA in the Czech Republic, Minister of the Ministry in Slovakia) and then to courts (administrative courts in the Czech Republic or general courts in Slovakia), or directly to administrative courts (Bulgaria, Lithuania, Croatia[10]) or directly to general courts (Poland).

This and other factors show clearly that there is a limit to the parallel between competition law and publicly enforced law against UTPs.

[10] By way of an administrative dispute and not an appeal.

The tension between the two is reflected also in the landmark attempt to regulate UTPs in the food supply chain on the EU level. The proposed directive follows years of discussions on whether UTPs in the farm sector are indeed widespread and cause real economic or social harm.

Like many member countries before, the European Commission has for years been torn between two conflicting urges – not to interfere with the competitive processes in the food supply chain because they bring efficiencies and benefit consumers on the one hand and on the other, to protect smaller producers and farmers against practices of big retailers and food processing companies using their bargaining power to press UTPs on their weaker partners. The counter-argument of course has been that thanks to the pan-European character of many retail networks and their advanced logistics, many small suppliers and producers were able to expand to new markets in a way which had not been possible before.

It is worth mentioning in this context, that just like many competition authorities in CEE mentioned in the reports, the EU competition enforcer, Directorate General for Competition (DG COMP), has been among the skeptics of the need to regulate this issue on the EU level. Faced with mushrooming national legislation in this sphere and evidence that some UTPs persist in the food supply chain despite efforts at self-regulation, DG COMP finally consented to a limited directive in this area. The directive, which still awaits final approval by EU bodies, reflects a cautious compromise also pursued by some CEE countries. It limits the scope of public enforcement to small and medium sized companies and contains a specific list of most notorious UTPs which should be prohibited. European Parliament, however is going to vote on 12th of March 2019 to broaden the scope of the directive and the final shape of the directive remains open.

In any case, implementing the directive will most likely force national legislatures, also in CEE, to revisit the issue and decide how to reconcile existing laws on public enforcement against UTPs in the food supply chain with the pan-European legislation.

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‘The reviewed book is a valuable contribution to the comparative study of law as it provides an overview of the retail food sector, of the legislation against unfair trade practices and of experiences with its application in eight CEE countries. Its content and scope make it unique addition to the ongoing debate on the regulation of significant market power and its unfair trading practices, namely because its “national reports” cover that part of the current EU, which often falls out of comparative studies of European legislation. (...) it is a very successful work in terms of its content and structure, which should reach specialists in the field throughout Europe.’

Assoc. Prof. Václav Šmejkal, PhD
Department of European Law,
Charles University Law School,
Prague, the Czech Republic

‘As I read this book, I found myself wishing that it had been available a bit earlier – in 2016, say, when the Polish legislative Act on counteracting unfair use of contractual advantage in the trade in agricultural and food products (“APA”) was being drafted. The book would be a veritable treasure trove of knowledge for the framers of this legislation. (...) the legislative procedure in the EU is still ongoing. Perhaps the final form of this Directive and its implementation around the EU might become the subject of another book by the authors – I, for one, hope so, and I will make sure to read it!’

Bernadeta Kasztelan-Świetlik
Partner in Gessel – law firm (Warsaw),
former Vice-President of the Polish Competition Authority

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