

Competition & Compliance Bulletin

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Draft act on unfair abuse of contractual dominance (“Draft”):

1. Scope
2. Contractual dominance and its unfair abuse
3. Proceedings
4. Fines
5. Assessment and takeaway

1. Scope

The Draft prohibits unfair abuse of contractual dominance in **food purchase agreements** between food suppliers and food resellers, and applies if the following annual turnover thresholds are met: (i) **the total turnover between the parties** to a food purchase agreement **exceeds EUR 12 thousand** (PLN 50 thousand) and (ii) the annual turnover of the entrepreneur (or turnover of the group to which it belongs) who unfairly abused contractual dominance **exceeds EUR 24 million** (PLN 100 million).

2. Contractual dominance and its unfair abuse

The **focal points** of the Draft are (i) contractual dominance and (ii) its unfair abuse. Both notions are anything but precise. **Contractual dominance** is defined as a situation between a supplier and a reseller in which there are no adequate and actual possibilities to sell the foodstuffs and there is a significant disproportion between their economic potential. Abuse of contractual dominance is considered to be **unfair** if it is contrary to good customs and it endangers or undermines counterparty’s essential interest.

The Draft provides a **non-exhaustive catalogue** of abusive behavior such as: (i) unjustified termination of an agreement or a threat thereof, (ii) unilateral right to terminate or withdraw from an agreement, (iii) making conclusion or continuation of the agreement conditional on acceptance or fulfillment of a service unrelated to the object of the agreement (eg. slotting fees), (iv) unjustified extension of payment terms.

At this stage it is unclear whether the above examples will be considered to be **per se violations** of law.

3. Proceedings

The enforcement powers in the area of unfair abuse of contractual dominance will be awarded to the President of Office for Competition and Consumer Protection (“OCCP”). This will be a **new competence** of OCCP in addition to the already existing powers, ie. cartel enforcement, merger

control and consumer protection. The proceedings are to be initiated **ex officio** however third parties which suspect to have been abused may **notify** it to the OCCP. The OCCP is obliged to inform the notifying party on the result of handling of the notification. The statutory duration of the proceedings is envisaged to take **5 months**.

4. Fines

The Draft foresees fines of up to **3% of annual turnover** which may be imposed on undertakings for the unfair abuse of contractual dominance. The amount of fine is calculated based on the **entire turnover** of the infringing party and it is not linked to the turnover generated by the food supply agreement in question. Further, providing untrue or misleading information in the course of the proceedings or obstructing of a dawn raid may be sanctioned with a fine of up to EUR 50 million.

The Draft does not provide for **liability of managers** or board members for unfair abuse of contractual dominance as such, however they can be fined up to EUR 45,000 for *inter alia* obstructing of a dawn raid.

Undertakings are allowed to offer **commitments** to remedy the breach. If the breach is made probable (but not proven) and a commitment decision is subsequently adopted by the OCCP, no fine can be imposed.

5. Assessment and takeaway

The Draft is aimed to **protect weaker** market players (usually suppliers) against the abuse of market and contractual power of larger companies (usually retailers). The goal is that all participants of the food supply chain can enjoy comparable rights and obligations regardless of their actual economic potential.

The Draft transposes into the administrative law the legal concepts (eg. slotting fees) which have been **already available** to market players under the civil law regime, eg. under the Act on combating of unfair competition. Apparently, entrepreneurs were often discouraged from bringing law suits to civil courts out of fear of losing the contracts.

It seems that due to low turnover thresholds the Draft will apply to **majority** of food supply agreements in the food supply chain. However absent court verdicts or OCCP's guidelines, the practical application of the Draft provisions may prove to be difficult as its core notions, ie. contractual dominance and unfair abuse are rather **ambiguous**.

In the future undertakings shall be prepared to **review** their existing contracts and negotiation practices in order to at least eliminate clauses which the Draft exemplifies as unfair abuse of contractual dominance (see above Item 2). **Particular attention** shall be paid to contractual provisions which are not directly linked to the purchase agreement itself, ie. slotting fees, marketing fees, promotional leaflet fees, etc. as well as to contractual clauses which favor only one party with regard to the termination or annulment of the contract.

The Draft is currently being proceeded in the Polish parliament and it can be reasonably expected that it will be passed – without significant changes - in the upcoming months. The *vacatio legis* is currently 6 months, which shall give the undertakings enough time to prepare for the upcoming change.
