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Legal instruments for strengthening the position of agricultural producers in the agri-food supply chain*

Strumenti giuridici volti a rafforzare la posizione
dei produttori agricoli nella filiera dei prodotti agroalimentari

The article deals with issues regarding the protection of the position of an agricultural producer in the agri-food supply chain *vis a vis* significant differences that frequently occur in the bargaining power between suppliers and buyers of agricultural and food produce. These issues are analysed against the background of unfair trade practices. The aim of the article is to answer the question of whether the normative solutions adopted at the EU and at national levels serve to adequately strengthen the position of agricultural producers in the food supply chain. It ends with a conclusion that despite the existence of certain legal mechanisms supporting agricultural producers, the protection they provide is still insufficient.

Keywords: supply chain, agricultural producer, farming sustainability, contractual clauses, Common Agricultural Policy

L'oggetto dell'articolo sono le questioni relative alla tutela della posizione di un produttore agricolo nella catena di approvvigionamento dei prodotti agroalimentari in relazione a significative differenze che spesso si verificano nel potere contrattuale tra fornitori e acquirenti di prodotti agricoli e alimentari in un contesto di pratiche commerciali sleali. L'obiettivo dell'articolo è quello di rispondere alla domanda se le soluzioni normative adottate a livello dell'UE e nazionale servono a rafforzare sufficientemente la posizione dei produttori agricoli nella filiera alimentare. Nella parte conclusiva, l'autrice afferma, tra l'altro, che meccanismi giuridici di sostegno ai produttori agricoli esistono, ma la tutela offerta non è sufficiente.

Parole chiave: filiera, produttore agricolo, sostenibilità della gestione, clausole contrattuali, politica agricola comune

* This article is dedicated to Professor Aleksander Lichorowicz on the occasion of his 85th birthday.

1. The subject of the article is issues related to the protection of the position of the agricultural producer in the agri-food supply chain in regard to frequently significant differences in bargaining power that occur between suppliers and buyers of agricultural and food products. These differences result from the use of unfair trade practices in contractual relations often used by larger and more powerful trading partners such as retail chains (food distributors) and agri-food industry players (e.g., buying points, processors). Their goal is to obtain agricultural products at most favourable terms and conditions and to strengthen their commercial dominance. In consequence, the relations they create lead to a market imbalance the effect of which is a deliberate and progressive economic weakening of agricultural producers.

Such efforts do not serve the fulfilment of one of the goals of legal and agricultural regulation, which is to ensure the sustainability of farming about the need for which Professor Aleksander Lichorowicz has often written.¹ He also emphasised that one of the most important principles on which all agricultural contracts should be based is the principle of protecting the stability and uninterrupted course of the agricultural activities on the farm that the produces has organised. Against the backdrop of this article, it is undoubtedly fundamental to grant protection to the interests and stability of the operation of a farm based on properly structured contractual relations for the production and sale of agricultural products. It is necessary to determine the principles of appropriate formation of mutual rights and obligations between the parties to the contract, which will guarantee the continuity of production, while ensuring an adequate level of livelihood for the agricultural producer. From the point of view of today's legislator and the adopted Common Agricultural Policy, the mutual relationship should also take into account the random nature of agricultural production and provide for the distribution of risks associated with its conduct to both parties to the contract.

The purpose of the article is to answer the question of whether the normative solutions adopted at the EU level, and consequently at the national level, serve to strengthen the position of agricultural producers in the food supply chain against unfair trade practices? In particular, it is a question of determining whether the tools used by market participants provide protection for agricultural producers?

¹ A. Lichorowicz, *Dzierżawa gruntów rolnych w ustawodawstwie krajów zachodnioeuropejskich (studium prawnoporównawcze)*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego DCCLXXX. Prace prawnicze” 1986, no. 18, p. 48.

There are a number of considerations behind the choice of the subject under discussion. First of all, the economic, and therefore competitive, situation of agricultural producers, or farmers, is weaker in comparison with that of business entities operating in other sectors. Agricultural production business is particularly vulnerable to external factors beyond control of agricultural producers who, additionally, do not have the ability to stop or suddenly change the direction of their production the effect of which is most often of a perishable nature, as it concerns products that are relatively perishable. These features, characteristic of the position of farmers in a broadly understood agricultural market, mean that the legal position of an agricultural producer as a party to certain contractual relations should be particularly protected.

Unfair trade practices used by more powerful entities have very serious negative consequences for farmers as they reduce the profits of the latter and, consequently, increase production costs. In other words, they serve to create overproduction and, as a result, an increase in food waste, and this does not go unnoticed among food consumers.²

It should be noted that the food supply chain serves to guarantee food security. Consequently, free and fair competition, a balanced relationship among all actors, freedom of contract, and strong and effective enforcement of relevant laws should be at its core.³

At the same time, it is noteworthy that the EU supply chain employs approximately 29 million people who directly or indirectly contribute to feeding its approximately 500 million inhabitants.⁴ Against the backdrop of the issues at hand, it must be raised that 99.1% of enterprises in the food products sector are small and medium-sized enterprises and microenterprises. Only a small percentage are large operators, although in fact it is they who most often engage in unfair trade practices.

The relevance of the issue under discussion is also influenced by the fact that improving the position of farmers in the value chain is one of the ten goals of the Common Agricultural Policy for 2023–2027, while providing effective mechanisms to combat unfair trade practices is one of its instru-

² Opinion of the European Economic and Social Committee on the ‘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) 32 final, 2017/C 034/21.

³ Plot no. 12 of European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain, 2015/2065(INI), O.J. C 86, 6.3.2018, pp. 40–50.

⁴ Eurostat, *Key figures on the European food chain*, Luxemburg 2023, p. 6.

ments, along with strengthening cooperation between farmers and increasing market transparency.⁵

2. The issue of strengthening the position of agricultural producers as the most vulnerable participants in the agri-food supply chain was recognised at the EU level two decades ago. At that time, in 2005, an opinion was prepared by the European Economic and Social Committee entitled “The large retail sector – trends and impacts on farmers and consumers.”⁶ In its content, the authors recognised the existence of certain “practices” in the acquisition of agricultural products, used by retail chains against agricultural producers. Those practices included the way in which prices and margins were set between retailers, suppliers (food processors), and primary producers. In the Committee’s view, the position of the latter needed to be strengthened so that they could be competitive in the market against retail chains.

The Committee’s took on the subject influenced the European Commission’s decision to set up a platform of experts on business-to-business contracting practices, under the High Level Forum for Improving the Functioning of the Food Supply Chain.⁷ It served to develop a set of principles for fair practices in relations among partners in the food supply chain. As a result, a number of unfair practices were recognised, which included ambiguous contractual terms, absence of written form, reserving retroactive changes to the content of the contract, unfair transfer of commercial risks, unwarranted use of information, etc. However, the Commission’s initiative at the time, as noted by Urszula Kłosiewicz-Górecka, did not contribute to the development and implementation of instruments to eliminate the use of unfair trade practices.⁸

As a result of a survey of individual solutions in member states, the European Commission suggested in 2014 a combination of voluntary initiatives – such as the platform and the creation of codes of good practice or

⁵ CAP Specific Objectives. Improve Imbalances in the Food Chain – Brief no. 3, https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27/key-policy-objectives-cap-2023-27_pl#dokumenty [accessed: 19.05.2024].

⁶ Opinion of the European Economic and Social Committee on: “The Large Retailers Sector – Trends and Impact on Farmers and Consumers,” O.J. C 255, 14.10.2005, pp. 44–51.

⁷ Commission Decision of 30 July 2010 establishing the High Level Forum for a Better Functioning Food Supply Chain, O.J. UE C 210, 3.8.2010, pp. 4–5.

⁸ U. Kłosiewicz-Górecka, *Nieuczciwe praktyki handlowe w łańcuchach dostaw FMCG*, „Logistyka-Opakowania” 2014, vol. 68, pp. 36–39. Cf. I. Lipińska, *Producent rolny wobec nieuczciwych praktyk rynkowych*, „Przegląd Prawa Rolnego” 2017, no. 2, pp. 61–76.

dispute resolution mechanisms within it – and soft-law regulatory measures.⁹ Two years later its work resulted in the adoption of the Report on Unfair Commercial Practices in the Food Supply Chain and the European Parliament Resolution on Unfair Commercial Practices in the Food Supply Chain.¹⁰

The Resolution stressed that unfair trade practices are contrary to the fundamental principles of law, and any action that exploits the imbalance in terms of bargaining power and adversely affects freedom of contract should be condemned. More broadly, it was raised that their use also affects employment, to the detriment of consumers' choice of goods, the quality, variety and innovative nature of the products made available. They may also harm business competitiveness and investment, and force companies to seek savings at the expense of wages, working conditions or the quality of raw material.¹¹ The Resolution repeatedly raised the need to create a list of exemplary fair and unfair practices in vertical relationships in the food supply chain, which would make it easier for its weakest links to easily identify them.¹² It noted that fair practices should be the result of mutual trust between partners based on the principles of freedom of contract and mutually beneficial relationships. These, in turn, should be free and based on fair competition.¹³

In addition, as indicated in the Resolution, applicable voluntary national and EU systems (such as codes of good practice, voluntary dispute resolution mechanisms) should be developed and promoted in conjunction with effective and robust enforcement mechanisms at the member state level. The idea is to ensure the anonymity of complaints and thus encourage producers as well as suppliers to respond to unfair practices that emerge and to introduce deterrent sanctions. At the core of the issue, the European Parliament has

⁹ *Study on the legal framework covering Business-to-Business unfair trading practices in the retail supply chain, Final Report*, 26.02.2014, Prepared for the European Commission, DG Internal Market, DG MARKT/2012/049/E.

¹⁰ European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain, 2015/2065(INI), O.J. C 86, 6.3.2018, pp. 40–50.

¹¹ More extensively on this topic: V. Daskalova, *Regulating Unfair Trading Practices in the EU Agri-food Supply Chain: a Case of Counterproductive Regulation?*, “Yearbook of Antitrust And Regulatory Studies” 2020, vol. 13, pp. 26–27.

¹² M.J. Cazorla González, *Unfair commercial practices in the food supply chain*, “Przegląd Prawa Rolnego” 2022, no. 2, p. 181 ff.

¹³ C. Ménard, *Summary and conclusions: the many challenges of unfair trading practices in food supply chain systems*, in: J. Falkowski, C. Ménard, R.J. Sexton, J. Swinnen, S. Vandeveld, *Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and regulatory aspects*, Luxembourg 2017, pp. 68–71.

suggested that the Commission, together with the member states, take joint action to fully and consistently enforce competition law, unfair competition rules and antitrust rules.

3. The result of the ongoing work at the EU level was the adoption of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair business-to-business commercial practices in the supply chain of agricultural and food products.¹⁴ Its purpose, according to Article 1, is to combat practices that grossly deviate from good business customs, contradict the principle of good faith and fair dealing, and are unilaterally imposed by one trading partner on another. In its content, the legislator set forth a minimum list of prohibited unfair trade practices in relations between buyers and suppliers in the supply chain of agricultural and food products and minimum rules for enforcing these prohibitions, as well as coordination arrangements between enforcement authorities.

According to the solutions adopted in the Directive, it is applied to certain unfair trade practices that occur in connection with the sale of agricultural and food products by suppliers¹⁵ and buyers¹⁶ with strictly defined annual turnover (Article 1(1) of the Directive).¹⁷ In comparison, it does not apply to contracts between suppliers and consumers.

In the normative act under review, the legislator obliged Member States at least to prohibit all the unfair trade practices indicated in its content.¹⁸ Among them are the so-called black clauses which include: 1) payment for perishable agricultural and food products later than 30 days; 2) payment for other agri-food products later than 60 days; 3) cancellation of orders for perishable agri-food products with short notice; 4) unilateral changes to

¹⁴ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair business-to-business commercial practices in the supply chain of agricultural and food products, O.J. UE L 328, 18.12.2019, pp. 7–28.

¹⁵ A supplier, according to the Directive, is an agricultural producer or a natural or legal person, regardless of where they are located or reside, selling agricultural and food products. The term “supplier” may include a group of such agricultural producers or a group of such natural or legal persons, such as supplier organisations and associations of such organizations.

¹⁶ A purchaser, according to the Directive, is a natural or legal person, regardless of where it is located, or a public body in the Union, who buys agricultural and food products. The term “purchaser” may include a group of such natural or legal persons.

¹⁷ M. Nový, *Market Power, Economic Dependence, or Bargaining Power: Why Do Titans Still Enjoy Protection in Several Member States*, “Časopis Pro Právní Vědu A Praxi” 2023, no. 3, pp. 176–178.

¹⁸ I. Lipińska, *Producent rolny...*, pp. 61–76.

the contract by the buyer; 5) payments unrelated to a specific transaction; 6) transfer of risk of product loss and spoilage to the supplier; 7) refusal of the buyer to confirm the supply contract in writing despite the supplier's request; 8) unauthorised use of company secrets by the buyer; 9) commercial retaliation by the buyer, and 10) transfer of the cost of handling customer complaints to the supplier (Art. 3(1) of the Directive).

In addition to the practices indicated, Member States shall ensure that at least all of the following commercial practices are prohibited, unless they have been agreed in advance in a clear and unambiguous manner in the supply contract or in a subsequent contract between the buyer and the supplier (so-called "grey clauses"): 1) the buyer returns unsold agricultural and food products to the supplier without paying for them or for their disposal, or for both the unsold products and their disposal; 2) a fee is charged to the supplier as a condition for storing, displaying or offering to sell its agricultural and food products or making such products available on the market; 3) the purchaser requires the supplier to bear all or part of the cost of price reductions on agricultural and food products sold by the purchaser as part of a promotion; 4) the purchaser requires the supplier to pay for the advertising of agricultural and food products carried out by the purchaser; 5) the purchaser requires the supplier to pay for the marketing of agricultural and food products carried out by the purchaser; and 6) the purchaser charges the supplier a fee for employees engaged in furnishing the premises used to sell the supplier's products (Art. 3(2) of the Directive).

The Directive, whose provisions apply as of 1 November 2021, requires each Member State to designate at least one authority competent to enforce the indicated prohibitions at the national level. However, Article 9 allows Member States to provide a slightly higher level of protection for suppliers, which could mean maintaining or introducing stricter rules to combat unfair trade practices.¹⁹ Covered by this provision, therefore, are possible deviations from the original rule of the five categories of turnover specified in Article 1 of the Directive.

The transposition period has now been completed and the first evaluation of the normative solutions contained in the Directive is being carried out. It includes verification of the effectiveness of measures implemented at the national level to combat unfair trade practices and cooperation between competent enforcement authorities and, where appropriate, ways to improve such cooperation (Article 12(1) of the Directive).

¹⁹ M. Nový, *Market Power...*, p. 179.

4. In Poland, legal issues relating to strengthening the position of agricultural producers in the supply chain were shaped by the Act of 17 November 2021 on counteracting the unfair use of contractual advantage in the trade of agricultural and food products,²⁰ and indirectly some instruments in this regard are provided for by the Act of 11 March 2004 on the organization of certain agricultural markets.²¹

The first of these entered into force in December 2021. It sets out rules and procedures for countering practices that unfairly exploit contractual advantages.²² The normative solutions contained in the law are intended to protect the public interests of suppliers or buyers. Accordingly, practices that unfairly exploit the contractual advantage of the buyer over the supplier and the supplier over the buyer are prohibited (Article 5 of the unwpk). The legislator clarifies in Article 6 of the unwpk that the use of a contractual advantage is unfair if it is contrary to good practice and threatens or infringes on the vital interest of the other party. On the other hand, a contractual advantage is the existence of a significant disproportion in the economic potential of the buyer vis-à-vis the supplier or the supplier vis-à-vis the buyer (Article 7 of the unwpk).

In order to properly implement it, the legislator designated the President of the Office of Competition and Consumer Protection (OCCP) as the competent authority in matters of practices unfairly exploiting contractual advantage and cooperation with the European Commission and the authorities of the European Union Member States whose scope of action includes the enforcement of regulations on practices unfairly exploiting contractual advantage (Article 11(1) of the unwpk).

Protection against practices that unfairly exploit contractual advantages in the marketing of agricultural or food products has been structured in such a way as to allow any entity to notify the President of the Office of the suspicion of their use (Article 15(1) of unwpk).

Proceedings in the scope in question are initiated *ex officio*. It may be preceded by an investigation which is supported by circumstances indicating a possible violation of the Act. Accordingly, an investigation may be initiated *ex officio* by order of its President. It is intended to serve as a preliminary

²⁰ Act of 17 November 2021 on counteracting the unfair use of contractual advantage in the trade of agricultural and food products, Journal of Law 2023, item 1773 (hereinafter: unwpk).

²¹ Act of 11 March 2004 on the organization of certain agricultural markets, Journal of Law 2023, item 1502 (hereinafter: uonrr).

²² Under Article 3(1), a supplier is an entrepreneur who manufactures or processes agricultural or food products or sells them to a buyer for a compensation.

determination of whether there has been a violation of the law justifying the initiation of proceedings for unfair contractual advantage practices, and also allows for a market survey (Article 14(2) of the unwpk). These proceedings end with the issuance of a decision.

The relevant proceedings end with the issuance of a decision by the President of the Office declaring a practice to be unfairly exploitative of contractual advantage, if he finds a violation of the prohibition referred to in Article 5. In its content, he orders the abandonment of the defective practice. Because of the special matter concerning the relationship between the buyer and the supplier of agricultural or food products, it should be completed no later than 5 months from the date of its initiation.

All actions in this regard are taken by the President of the Office on his own, and he may also commission the Trade Inspection to conduct inspections or carry out other tasks within his scope of action. These may result in the President of the Office imposing on the supplier or purchaser, by way of a decision, a fine of no more than 3% of the turnover achieved in the financial year preceding the year in which the fine is imposed, if the supplier or purchaser, even if unintentionally, committed a violation of the ban.

In turn, in the Law on the Organization of Certain Agricultural Markets, under Article 38q (1), any delivery of agricultural products belonging to the sectors referred to in Article 1 (2) (a), (c) (for sugar beets only), (f), (h), (i), (n), (o), (p) (for raw milk only), (q), (r), (s), and (t) of the Regulation. q, r, s and t of Regulation No. 1308/2013 (excluding direct deliveries and agricultural retail trade and direct sales), by a producer who is a farmer whose farm is located in the territory of the Republic of Poland, to a first buyer who is a processor or distributor who does not sell these agricultural products directly to final consumers, requires the conclusion of a contract that meets the conditions set forth in the aforementioned regulation.²³

The conditions of the contracts in question are indicated in Articles 125, 127, 148 (2), 168 (4) and (6), as well as in Annexes X and XI to Regulation No. 1308/2013. The adoption of specific requirements involves the obligation to include in the contract solutions relevant to the sectors in question and listed in the regulation. The obligation to conclude contracts for the supply

²³ 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, O.J. L 347, 20.12.2013, pp. 671–854. These products include: cereals, hops, flax and hemp, fruits and vegetables, tobacco, beef and veal, pork, mutton and goat meat, eggs, poultry meat.

of agricultural products was introduced in order to: eliminate unfair trade practices, strengthen the position and increase the competitiveness of the agricultural producer in the food supply chain, and improve the functioning of cooperation and relations between the agricultural producer and the buyer in the market of agricultural products. As a result, the use of other solutions and commissions than those indicated in the regulation can be read as the use of prohibited contractual clauses, weakening the position of the agricultural producer.

The power to control the conclusion of contracts is vested in the National Centre for Agricultural Support. The law also provides in Article 40i para. 1a criminal sanctions against a purchaser acting in violation of Article 38q, para. 1 or 1a, and acquiring the agricultural products indicated above on the basis of a contract that does not meet the conditions specified in Article 148, para. 2(c)(ii, iii, iv, v or vi or Article 168, para. 4(c)(ii, iii, iv, v or vi of Regulation No. 1308/2013. A fine may be imposed on the purchaser for each unfulfilled condition in the amount of 1% of the payment within the meaning of Article 29a (1) of the Act of 11 March 2004 on Value Added Tax for the products acquired as a result of such an agreement.

5. In an attempt to assess the effectiveness of the adoption of the Directive in 2019 and, consequently, after the enactment of the Act of 17 November 2021 on Counteracting the Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products for its implementation, it should be noted that the objectives of both normative acts have not as yet been achieved. This is evidenced by figures. According to a report by the Office of Competition and Consumer Protection (OCCP), in 2022 its President commissioned 17 investigations, including four proceedings on practices that unfairly exploit contractual advantage. As a result, three case decisions were issued, imposing a financial penalty. In addition, the Office conducted the 1st new inspection within the framework of contractual advantage proceedings and inspected two entrepreneurs. In 2023, the Office received notices from 72 entrepreneurs. The work carried out resulted in the issuance of 14 soft notices to entrepreneurs and the issuance of 1 significant view in a case.²⁴ In addition to those mentioned, the President of the OCCP continued his actions from the previous period in verifying the rules of cooperation between farmers and larger entities operating in the grain purchase market. As a result, he initiated seven investigations into the practices used by grain

²⁴ Report on the activities of the OCCP – year 2022, Warsaw 2023, pp. 28–34.

buyers, which included Cargill Poland, ADM Direct Polska, Bunge Polska, Polskie Młyny, Viterro Polska (formerly Glencore Polska), Louis Dreyfus Company Polska, Procam Polska. They referred, among other things, to the methods of settlement between the entities, the obligations of the parties to the contract, taking into account the distribution of risks, the imposition of contractual penalties and force majeure provisions.²⁵

During the period under review, the volume of fines imposed totalled PLN 70.9 million. Of which the largest, in the amount of PLN 68.5 million, was imposed on Agri Plus from Poznań²⁶ in connection with violations of the Act on the grounds of unfair use of contractual advantage. The Office's actions were initiated as a result of information received from, among others, the Agency for the Development and Modernization of Agriculture. Its contents indicated that the trader was taking away compensation granted by the State to farmers for losses related to African swine fever (ASF). According to the Report, the entrepreneur used a model contract, in which he defined the content of the agreement with farmers in such a way that he obliged them to transfer to it the public aid received, as provided for in §131 of the Regulation of the Council of Ministers of 27 January 2015 on the detailed scope and implementation of certain tasks of the Agency for the Restructuring and Modernization of Agriculture.²⁷ The procedure continued despite the fact that it was micro, small and medium-sized farmers in areas under restrictions due to ASF eradication who were entitled to receive public aid to compensate for the reduced income which resulted from a reduction in the number of customers or lower selling prices. The procedure continued from 2017 to 2022, while the trader reduced the prices of the pigs by the amount of compensation, believing that as the organiser of the contract fattening system, it was entitled to compensation for ASF losses. In addition, the Company also organised a system for monitoring the public assistance received by the breeders. Its actions put 992 permanent suppliers at risk. As a result, it collected about PLN 12 million from dozens of contractors.

Another example of the use of unfair contractual advantage was the action of the Company Cefetra Polska.²⁸ The President of the Office noticed defective clauses in its contracts for the supply of cereals, rapeseed and

²⁵ Ibidem.

²⁶ Decision RBG-14/2022.

²⁷ Regulation of the Council of Ministers of 27 January 2015 on the detailed scope and implementation of certain tasks of the Agency for the Restructuring and Modernization of Agriculture, Journal of Law 2015, item 187 with amendments.

²⁸ Report on the activities of the OCCP..

legumes.²⁹ Based on these, the company required its contractors to supply even when, due to the effects of force majeure and for reasons beyond the farmers' control, they were unable to fulfil their obligations. According to the Report, in some cases the losses transferred 50% of the average annual agricultural production of the supplier's farm. At the same time, to demonstrate force majeure, the farmer-supplier had to provide the company with a document confirming the imposition by the State of a natural disaster in the area in which he operated. In addition, the company expected the farmer to demonstrate a very high extent of losses on the supplier's farm, which in practice made it impossible for the company to exempt itself from the obligation to provide benefits. This resulted in imposing contractual penalties on agricultural producers and charging them for the cost of purchasing from another entity. In the course of the proceedings, the President of the Office found a violation in the form of burdening suppliers with excessive risks associated with the performance of contracts, and imposed a penalty of more than PLN 2 million on the enterprise.³⁰

Another very important problem indicating unfair use of contractual advantage is the actions of some retail chains provided to suppliers of agri-food products. These include, for example, the imposition of peri-sales fees for IT services (support in this regard), marketing services (assistance in sales through electronic communication; placement of goods), laboratory services (provided to suppliers supplying the chains with products subsequently sold under the retailers' own brands) or logistics services (delivery of goods to logistics centres and stores). The indicated practices fall into the group of grey clauses to which manufacturers may or may not agree. In the cases inspected, retail chains omitted to notify their suppliers of this possibility, making them obligatory.³¹ In the report, the President of the OCCP stressed that the issue of using circular services should be freely negotiated between the parties and cannot be unilaterally imposed on the weaker partner. For unfair practices related to the collection of such fees, the President of the OCCP imposed a penalty of PLN 76 million on Eurocash in 2021.³²

²⁹ A similar practice was used against grain producers by PolishAgri, which imposed aprepared model contract on small agricultural producers. Based on it, it burdened them with excessive risks related to the performance of the contract as a result of force majeure, and obliged them to pay a penalty or buy grain on the open market on their own or bear the cost of a replacement purchase made by PolishAgri. The penalty in this case amounted to more than PLN 300,000; Decision RBG-9/2022.

³⁰ Decision RBG-2/2022.

³¹ Report on the activities of the OCCP...

³² Decision RBG-3/2021.

Unfair conduct has also been spotted in the milk market in relations between dairy cooperatives and its members. The President of the OCCP analyzed the concluded contracts for the sale, delivery and contracting of milk received from farmers and other sources. As a result of the inspection, it was discovered that the rules of cooperation between the designated entities were not always favourable to farmers who performed their obligations pursuant to a prepared model contract, on the content of which they had no influence.³³

Among the practices questioned were those of the Mlekpól Dairy Cooperative - one of the largest producers of milk and dairy products in Poland which purchases milk from a total of more than 8,400 suppliers. The cooperative exploited its contractual advantage through such practices as: 1) the possibility of unilaterally changing the milk purchase price list, including retroactively; 2) hindered supplier access to full information on the terms of contract performance; 3) unclear rules for the application of penalties and their arbitrary imposition, reducing the price for full-price milk during the contract termination period.³⁴

Inspection of contracts under the Act on the Organization of Certain Agricultural Markets is carried out on the basis of notification and market analysis. The National Agricultural Support Centre (NEB) in 2023 selected 44 apple traders, 35 pork traders and 46 soft fruit buyers (strawberry, raspberry, blueberry) for inspection.³⁵ In total, during the period under review, it carried out 133 inspections, as well as accepted 7 notices of suspected violations of contractual obligations and issued 15 decisions to impose fines for the purchase of agricultural products without a contract or on the basis of a defective contract.³⁶

6. The considerations carried out serve to formulate several final conclusions. First of all, despite the transposition into national law of the instruments indicated by the 2019 Directive, it is still not possible to speak of a provision of effective mechanisms to combat unfair trade practices. Although the instruments have been developed and implemented, they do not serve the expected protection of agricultural producers, i.e. fair transmission of prices along the entire value chain. Thus, it is necessary to further improve the European mechanisms for combating unfair trade practices. This will

³³ Decision RBG-4/2023.

³⁴ Report on the activities of the OCCP..., p. 34.

³⁵ Report on the activities of the National Agricultural Support Center in 2023, Warsaw 2024, pp. 168–170.

³⁶ Ibidem.

effectively update the list of the most common trade practices. In addition, agricultural producers and the organisations representing them will also the need to expand the scope of the Directive so that national regulations also included certain non-food products.³⁷ To those belong flowers, ornamental plants or natural decorative products obtained among other things in the course of farming.

As noted, strengthening the position of farmers in the food supply chain is one of the key objectives of the CAP. It can be achieved through the development of cooperation among the actors of the chain (agricultural producers), so that, as representative actors with greater power in the market, they will be able to enforce the use of the legal instruments developed. This may also be achieved by the creation of a transparent observatory of production costs, margins and trade practices, which has been under consideration for a long time.

Finally, it is worth pointing out, following the European Commission, that it is also necessary to introduce provisions for cross-border enforcement of unfair trade practices in order to strengthen cooperation between national enforcement authorities, in particular by improving the exchange of information and collection of penalties.³⁸

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³⁷ A. Sorrentino, C. Russo, L. Cacchiarell, *Market power and bargaining power in the EU food supply chain: the role of Producer Organizations*, “New Medit” 2018, no. 4, pp. 23–24.

³⁸ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Implementing the prohibition of unfair trade practices to strengthen the position of farmers and actors in the agricultural and food chain – state of play, Brussels, 23.4.2024, COM(2024) 176 final.

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