CROATIA

Unfair Trading Practices in the Food Supply Chain – New Competence of the Croatian Competition Agency

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At the EU level, long-term discussions on unfair trading practices in the food supply chain have resulted in the Proposal for a Directive that is currently in process. The Republic of Croatia has already adopted a law with a similar subject matter – the Act on Tackling Unfair Trading Practices in the Food Supply Chain (the "Act") – which entered into force at the end of 2017. The Act concerns business-to-business relations and aims to protect suppliers (including primary producers) in their relations with resellers, buyers, and processors with significant negotiating power. The authority in charge of implementing the Act is the Croatian Competition Agency (the "Agency"), which the legislator considers the most competent to handle these matters due to its experience in abuse of dominance cases in competition law.

Whether someone has significant negotiating power or not is determined on the basis of the aggregate turnover realized by the respective undertaking (turnovers of affiliated companies are included in the calculation) in the Republic of Croatia. For resellers, the aggregate turnover has to exceed HRK 100 million (approximately EUR 13.4 million), while the threshold is set at HRK 50 million (approximately EUR 6.7 million) for buyers and processors. According to the legislative preparatory acts, these thresholds should cover approximately 95% of traders in Croatia.

The Act aims to prevent and penalize the exploitation of significant negotiation power; *i.e.*, the imposition of unfair trading practices (UTPs). It lists different examples of UTPs, such as contracts and general terms which are not in accordance with the Act; payments which are not clearly indicated on the invoice (including the specification of discounts or rebates); possibility of unilateral termination of contract without justified reason; obligations imposed on suppliers which go beyond the contracted ones; disproportionate contractual penalties; imposing various payment obligations which should not be the burden of suppliers (*e.g.*, listing fees, fees payable for the purpose of stocking of products after delivery, fees payable due to reseller's decreased sales); *etc.*

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Undertakings were obligated to ensure compliance with Act's provisions – *i.e.*, revise their contracts, invoices, and business practices as necessary – by the end of March 2018, as contracts made before the entry of the Act ceased to be valid as of April 1, 2018. Apart from facing the potential nullification of contracts in certain cases (*e.g.*, if the contract is not made in a written form or if it does not contain mandatory provisions prescribed by the Act), undertakings are exposed to high fines for breaches (as high as HRK 3.5 million (approximately EUR 0.4 million) – or even HRK 5 million (approximately EUR 0.7 million) for the most severe breaches).

A few months after the Act became fully applicable (*i.e.*, after April 1, 2018), the Agency conducted market research by requesting that more than 30 undertakings deliver more than 100 contracts made with national and international undertakings in the food supply chain. According to publicly available information, more than 20 proceedings were initiated on the basis of this market research, including several against bigger retail chains.

It will be important to keep track of further developments and of the decisions of the Agency, which have yet to be adopted, especially because initial interpretations of the Act (provided in the form of "frequently asked questions" (FAQ)) were subject to significant changes (*e.g.*, it was stated first that the assortment rebate approved by the supplier to the reseller always constitutes a UTP, while the subsequent amendments to the FAQ stated that such rebates are permissible under certain conditions). A line will have to be drawn in practice as to what is and what is not a UTP. If the related EU Directive is adopted, the situation might become even more complex, as the provisions and interpretations of the Act will have to comply with the EU Directive, and current practices might need to be further adjusted.

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