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Relations in the FMCG Supply Chain – the Possibility of Self-Regulation or the Necessity of Legal Regulation?

Summary

An aim of the article is to assess the state of regulation of the relations between business partners in the FMCG distribution channels and an attempt to answer the question whether it is possible to work out in the EU countries a compromise among the supply chain participants, i.e. a joint adoption of good practices and abstention from improper actions or rather there will be necessary to introduce a uniform, restrictive legal act. The scope of analysis covered the relations between sales networks and FMCG suppliers. The article was prepared on the basis of the literature on relations between enterprises in distribution channels as well as materials of the European Economic and Social Committee; EESC. The description and analysis of the phenomena and processes occurring in relations between entities of the FMCG supply chain comprised irregularities occurring in the contacts between goods deliverers and commercial enterprises as well as the existing and proposed in this respect solutions. As important there is considered the information and education aspect of this article.

Key words: relations between enterprises, sales networks, supply chain, unfair trade practices.

JEL codes: L81

Introduction

An aim of the article is to assess the state of regulation of the relations between business partners in the FMCG distribution channels and an attempt to answer the question whether it is possible to work out in the EU countries a compromise among the supply chain participants, i.e. a joint adoption of good practices and abstention from improper actions or rather there will be necessary to introduce a uniform, restrictive legal act. The scope of the analysis covered the relations between large-format trading facilities and FMCG suppliers.

There are set out the following research hypotheses:

- in relations between trade networks and goods suppliers, the market power (understood as an ability to impose the terms of trade on market partners) is on the side of commercial firms;
- relations between business partners in the FMCG supply chains require undertaking the actions aimed at abstention from unfair trading practices (UTP), preferably through self-regulation in the supply chain in order to avoid introduction of a uniform restrictive legal

act in force in all the EU countries. It will become possible only with adoption of intense information and education measures.

For the purpose of achievement of the set out aim, the author applied the descriptive and analytical method, making use of the available literature concerning the processes of globalisation of trade and its effects for domestic enterprises (Sławińska 2008), the processes of concentration in trade (Ciechomski 2010), functioning of entities in the FMCG supply chains (Borusiak 2008; Kowalska 2012) as well as materials of the European Economic and Social Committee.

Unfair trading practices in the FMCG supply chain

The development of networks of large-format trading facilities in individual countries meant for suppliers an emergence of a new direct channel of FMCG distribution, substantially differing from the so-called traditional distribution channel being formed by wholesaling and retailing firms. Networks of large-format trading facilities allow suppliers gaining benefits such as sale of large lots of merchandise for one trading company, reaching higher efficiency in introduction to the market of new commodities, the possibility to develop original forms of merchandise promotion and achievement of high efficacy of promotional measures, the opportunity for a measurable evaluation of cooperation with a commercial enterprise, gaining knowledge in the area of merchandising (Repert 2001; Repert 2005; Kowalska 2012). However, achievement of those benefits has appeared to be difficult under the conditions of the dominance of sales networks (Ciechomski 2010), which, taking advantage in their contacts with suppliers impose prohibitive terms of cooperation, committing unfair trading practices such as (Kłosiewicz-Górecka 2008; *Współpraca...* 2011):

- imposing by networks the terms of 'entering' the network,
- imposing by networks the conditions of the supply of goods,
- shifting on suppliers of costs of transportation and storage,
- pressure exerted by networks on reduction of prices of goods delivered by producers,
- shifting on suppliers of costs of goods promotion in sales rooms.

Unfair trading practices in the FMCG supply chain have become such a vital problem that individual countries of the European Union have undertaken attempts to regulate relations between business partners. Currently, at the national level, there are used various instruments (*Green Paper...* 2013):

- civil law provisions, e.g. through adoption of specific provisions of the commercial law or based on the administrative law in force in France, Belgium, Italy and Spain;
- codes of conduct focusing on the supply chain, e.g. in Portugal, Slovenia, Spain, Belgium (*Kodeks postępowania...* 2010) and in the United Kingdom.

In individual countries, for the purpose of eliminating UTP there are used various mechanisms of provisions enforcement. They comprise (*Green Paper...* 2013):

- claims vindication before the court (most member states),

- possibility to instigate proceedings by the authorities dealing with competition based on the national regulations on unilateral conducts (Spain),
- claims vindication by way of administrative procedures (France),
- Ombudsman (United Kingdom).

However, they are not efficient, like in Poland, where unfair trading practices in supply chains take place despite the existence of laws in force being the legal bases for contracts between suppliers and commercial enterprises. They include (Kłosiewicz-Górecka 2014):

- The Civil Code that describes the main principles of formation of trade relations between entrepreneurs;
- The Act on Payment Terms in Commercial Transactions whose purpose is protection of weaker contractors against extortion by stronger partners of long payment terms. The Act determines the principles of demanding interest by goods and services suppliers in definite situations;
- The Act on Competition and Consumer Protection banning agreement in a broad sense (including contracts) whose purpose or effect is to eliminate, reduce or breach in another way competition. The Act indicates the examples of clauses breaching the law;
- The Act on Combating Unfair Competition whose aim is to prevent and combat unfair competition between enterprises.

Many controversies are aroused by the currently in force hearing the deeds of unfair competition as a matter of private law. It is emphasised that the principle of *ex officio* prosecution (the *ex officio* principle) is a general norm in accordance with which instigation and continuation of criminal proceedings in the matter of crime is an expression of implementation of the general public (state) interest and it does not require either an initiative or cooperation on the part of harmed persons. Hence, crimes, including unfair trading practices, should be prosecuted *ex officio* by the specialised state bodies, in particular by the public prosecutor's office and the police. There is indicated that the criminal action may be instigated not only irrespective of the will of the person harmed by crime but even contrary to his will (the position presented by the Industrial and Commercial Congregation 2013).

Discussions are aroused by the wording of Art. 15.1.4 of the Act on Combating Unfair Competition in the part referring to the definition of margin. Whereas some people postulate merely rephrasing the erroneous wording "*The deed of unfair competition is hindering entrepreneurs the access to the market by way of charging of other fees than the trade margin charges for in-store sales*", for others this is a multithreaded problem of combating unfair trading practices, requiring establishment of a procedure of protection against UTP (determination who monitors and who reveals irregularities) and working out a procedure of enforcement of the regulations combating unfair practices and, first of all, restoration of mutual confidence between suppliers and sales networks (<http://www.portalspozywczy> 2013). Within the last two years, due to the actions brought by suppliers, demanding recovery of the so-called shelf payments, relations between suppliers and networks have significantly deteriorated. This has occurred so despite the earlier undertaken by partners initiatives aimed at creating an atmosphere for good cooperation and development of trade contacts. There was, *inter alia*, the work on the so-called Code of Ethics of the Polish Trade and Distribution

Organisation, establishment within the organisational structures of the Association of Private Dairy Processors (ZPPM in Polish) of the team for trade with the scope of work related, among other things, to working out a model of cooperation with retail networks. The confidence has been devastated by much unethical behaviour of both business partners, and the present situation is difficult for both parties (Kłosiewicz-Górecka 2014).

Summing up, the applied in individual countries mechanisms of enforcement of the regulations serving combating UTP are ineffective and in result of the present fragmentation of the regulations in the EU market enterprises are not able to benefit from coherent protection against unfair trading practices.

Unfair trading practices in the FMCG supply chains – proposals for problem resolution at the EU level

Unfair practices in the supply chain have become such a crucial problem that nowadays there is suggested resolution thereof at the level of the European Union. The issue was dealt with as soon as in 2005 when UTP became an object of work of the European Economic and Social Committee which emphasised the weight of the problem and criticised its negative aspects (*Sektor wielkich detalistów...* 2005).

In 2007, there appeared a written declaration on examination of the cases of abuse of their power by large supermarkets carrying out their activities in the European Union countries and counteracting them, in which there was an appeal to the European Commission to undertake measures aimed at alteration of the situation (*Oświadczenie...* 2007). Two years later (2009), the issues of unfair trading practices in the supply chain became a subject of the debate within the EU food sector, on the occasion of growth of consumer prices related to the growth of prices for agricultural products. It was mentioned then that lack of transparency of the market, unequal bargaining powers and unfair trading practices had led to occurrence of turbulences in the market negatively affecting competitiveness of the entire chain of food products supplies. A reaction of the EU to those phenomena was establishment within the European Commission of the High Level Forum for a Better Functioning Food Supply Chain – a platform of experts for practices related to contracts being concluded between enterprises. The platform of experts has worked out a set of principles concerning the practices in the food supply chain (Table 1), which are presented in the *Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe* (*Green Paper...* 2013).

The principles concerning practices in the food supply chain have been adopted by 11 organisations representing environments of the European supply chain, covering agriculture, food processing industry and trade. Those are the following organisations: AIM, CEJA, CELCAA, CLITRAVI, Copa Cogeca, ERRT, EuroCommerce, Euro Coop, FoodDrinkEurope, UEAPME, UGAL. In 2013, eight of them (AIM, CELCAA, ERRT, EuroCommerce, Euro Coop, FoodDrinkEurope, UEAPME, UGAL) declared their intent to launch the process of implementation of fair practices on the voluntary basis. The work in this area has been supported by the European Commission which, at the same time, has prolonged the time-period

of work on finding compromise as regards implementation of the principles of fair practices by the end of 2014 (*Decyzja Komisji...* 2012). At that time, there will be continued work on evaluation of effects of various solutions allowing elimination of UTP. It's about, *inter alia*, the following:

- an analysis of various potential solutions – from self-regulation to legislation;
- examination of the possibility and legitimacy of resolving this problem at the national level as well as determination whether there is indispensable resolution at the level of the European Union.

Table 1
Types of unfair trading practices (UTP) identified by the High Level Forum for a Better Functioning Food Supply Chain and based on the works performer by the European Commission

Unfair practices	Proposals of fair practices
Ambiguous contractual conditions which enable imposition of additional liabilities on the weaker party to the contract.	Obliging the parties to the contract to ensure formulation in contracts of the rights and obligations, including sanctions, in a transparent and unambiguous way. Contract sanctions should be adequate to the damage incurred by the business partner.
Lack of a written contract causes that unfair practices can be much easier imposed.	Contracts should be formulated in writing.
Retroactive amendments of the contract	In the contract, each of the parties should precisely define the circumstances in which the parties may jointly change terms thereof in due course and consciously as well as the detailed principles of amending, including the procedure of fixing compensation on account of the costs incurred in result of contract amendments initiated by one of the parties.
Unfair transfer of the trade risk , which covers various practices, e.g. burdening of the supplier with responsibility for stolen goods in retail trade; financing activities of the other party; abuse of practices of the so-called 'reverse margin'.	It should be agreed that each of the parties accepts responsibility for their risk and will not make unjustified attempts to transfer their risk on the other party, while payments for valid services should correspond to their value. Parties should not demand payment for not provided services or demand payments blatantly differing from the provided service's value/ costs.
Unfair use of information may characterise a number of unfair trading practices.	Commitment of each of the parties to fair use of information passed to the party to the contract within trade relations. Each of the parties shall with due diligence take care that the conveyed information was correct and did not mislead.
Unfair termination of trade relation. Co-operation termination should not be used as a way of intimidation of the contractor.	Provision of fair terms of contract termination, with preservation of adequately long period of contract termination in relation to the party receiving the notice of contract termination.
Territorial limitation of supplies may hinder retailers their sourcing with similar goods abroad in the central points of supplies and their distribution to the member states.	They may occur only when they are justified by objective reasons of productivity.

Source: U. Kłosiewicz-Górecka (2014), *Nieuczciwe praktyki handlowe w łańcuchach dostaw FMCG. Rzeczywistość i postulaty*, "Przemysł Spożywczy" No. 3, p. 37, worked out on the basis of *Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe*. European Commission, Brussels 31.01.2013 COM (2013) 37 final.

The signatories of the joint document concerning the principles of good practice in the business-to-business relations within the food supply chain thus expressed their conviction that carrying out activities in the mode of self-regulating multilateral agreement will serve well:

- the matter of order of relations between manufacturing and trade in food,
- the process of growth of innovativeness and competitiveness of food production in the EU as well as effectiveness of food retailing and wholesaling.

It is assumed that entities of the supply chain should act in compliance with provisions of the law, including the law of competition, and observe the general rules indicating that business partners (*Stosunki wertykalne...* 2011):

- should always take into account the interest of consumers and an overall sustainability of the supply chain, ensuring the possible greatest efficacy and optimisation of resources while distributing commodities in the entire supply chain;
- are independent business entities respecting their mutual rights to determine their own management strategy and policy, including the freedom of making decisions in the matter of concluding whatever contracts;
- should cooperate with one another in a responsible way, in good faith and exercising due professional diligence.

Adaptation to the national level of the draft of self-regulating initiative in the area of food supply chain

As it has already been emphasised, at present, the EU market does not have any mechanisms of enforcement of the regulations serving combating unfair trading practices in the supply chain. Therefore, in the face of ever intensifying aggressive competition, the presented draft of self-regulating initiative in the area of food supply chain should become in individual EU countries for producers and trade a stimulus to actions for improvement of relations in the supply chain in order to avoid a possible regulation of the market with directives and regulations. At this stage of actions, it is important that in individual countries are undertaken information and education measures related to the self-regulating initiative in the area of FMCG supply chain. There is the need to clearly communicate that in individual countries the process of self-regulation for arranging relations in the supply chain should be implemented on the grounds of the principles already developed at the EU level. They emphasise that:

- the process is organised and implemented by producer and trade organisations which form the so-called National Dialogue Platforms;
- the addressees and subjects of the process of self-regulation are enterprises from the production and trade sector, and these are them who make the decision on accession to the self-regulating system;
- at the EU level, there acts the so-called Governance Group which coordinates and supervises the implementation of principles;

- at the national level, there should be used the already developed formalised system of recruitment of enterprises (with a particular attention paid to small and medium-sized businesses), implementation of the principles eliminating reprehensible practices as well as audit and way of monitoring and reporting the process of self-regulation of relations in the supply chain;
- there are introduced arbitration and mediations as the promoted methods of resolution of possible disputes between business partners, what does not eliminate possible court proceedings;
- the leading criteria in implementation of the trading practice are: voluntariness, freedom of contracts and equivalence of services.

According to the Governance Group, correctness and effectiveness of activities at the national level for self-regulation of relations in the FMCG supply chain are determined by:

- undertaking an information action promoting the idea of self-regulation and benefits thereof, addressed to enterprises, business organisations and public opinion;
- adaptation of Community documents to the national needs. This is connected, *inter alia*, with introduction of possible amendments and extensions to the list of unfair trading practices presented in the *Green Paper*;
- preparation of the documents to submit the participation declaration and implementation of the procedure of accession of national manufacturing and trading enterprises to the system of self-regulation of relations in the supply chain;
- determination of the terms and conditions of launching and carrying out the audit, mediation and arbitration procedure in the system;
- synchronisation of the actions carried out by the National Dialogue Platform and the Governance Group;
- collecting information on progresses in implementation of the system of self-regulation of relations in the supply chain and preparing partial annual reports and the final report as of the end of 2016.

This is a wide range of work to be performed, which for an efficient implementation requires setting up in the country not only a good climate for implementation of the self-regulating initiative in the area of food supply chain but also information and education support to the debate on practices (identification of those permitted and forbidden) as well as building awareness of usefulness of mediation and arbitration.

The European Commission expects that an effective implementation of the initiative of self-regulation of relations in the supply chain will allow avoidance of regulations which may have a negative effect to competitiveness of the Community's economy. It is admitted that the initiative may have succeeded if:

- there is achieved a relevant level of presence of domestic firms in the initiative (representativeness);
- there are established the National Dialogue Platforms (which will allow achievement of a high rate and number of registrations of enterprises to the initiative) as well as there are adequately merged with the Community's Platform.

The European Commission also expects that there will be eliminated difficulties in the form of lack of clarity as to the sanctions for breaching the principles of voluntary agreement within the framework of initiative and yet weak representation of small and medium-sized domestic manufacturing and trading firms. In Poland, due to a great subjective atomisation in trade, the problem of interest of SMEs is of a particularly great importance. Hence, there is a great challenge for organisations of producers and trading firms in encouraging them to sign the initiative.

Recapitulation and conclusions

- The carried out analysis allowed positive verification of the made research hypotheses.
- Activities of trading networks have changed relations between producers and trading enterprises in the FMCG supply chain as well as the realities of competing in trade where now unfair trading practices take place.
- In the EU market, there are no mechanisms of enforcement of the regulations serving combating UTP.
- Organisations of producers and trading enterprises in individual EU countries should join the actions for the initiative of self-regulation in the FMCG supply chain in order to avoid the possible planned EU regulation which is considered as not enough flexible and the one that may yield unfavourable consequences for the chain participants and consumers under diversified conditions among the EU member countries.

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Relacje w łańcuchu dostaw FMCG – możliwość samoregulacji czy konieczność regulacji prawnej?

Streszczenie

Celem artykułu jest ocena stanu regulacji relacji pomiędzy partnerami biznesowymi w kanałach dystrybucji FMCG i próba odpowiedzi czy możliwe jest wypracowanie w krajach UE kompromisu wśród uczestników łańcucha dostaw, tj. wspólne przyjęcie dobrych praktyk i powstrzymanie się od niewłaściwych działań czy raczej konieczne będzie wprowadzenie jednolitego, restrykcyjnego aktu prawnego. Zakresem analizy objęto relacje pomiędzy sieciami handlowymi i dostawcami FMCG. Artykuł przygotowano na podstawie literatury dotyczącej relacji przedsiębiorstw w kanałach dystrybucji oraz materiałów Europejskiego Komitetu Ekonomiczno-Społecznego. Opis i analiza zjawisk i procesów zachodzących w relacjach pomiędzy podmiotami łańcucha dostaw FMCG objęły nieprawidłowości pojawiające się w kontaktach dostawca towarów – przedsiębiorstwo handlowe oraz istniejące i proponowane w tym zakresie rozwiązania. Za istotny uznaje się informacyjno-edukacyjny aspekt niniejszego artykułu.

Słowa kluczowe: relacje między przedsiębiorstwami, sieci handlowe, łańcuch dostaw, nieuczciwe praktyki handlowe.

Kody JEL: L81

Отношения в цепочке поставок товаров повседневного спроса – возможность саморегуляции или же необходимость правового регулирования?

Резюме

Цель статьи – оценка состояния регуляции отношений между бизнес-партнерами в каналах распределения товаров повседневного спроса и попытка ответить на вопрос, возможна ли выработка в странах Евросоюза компромисса среди участников цепочки поставок, т.е. совместное принятие хорошей практики и воздержание от неуместных действий, или же скорее всего будет необходимо введение унифицированного, рестриктивного правового акта. Диапазон анализа охватил собой отношения между торговыми сетями и поставщиками товаров ширпотреба. Статья подготовлена на основе литературы по отношениям между предприятиями в каналах распределения и материалов Европейского экономико-социального комитета. Описание и анализ явлений и процессов, происходящих в отношениях между субъектами цепочки поставок товаров ширпотреба, охватили собой погрешности, появляющиеся в контактах между поставщиком товаров и торговым предприятием, а также существующие и предлагаемые в этом отношении решения. Существенным признают информационно-образовательный аспект статьи.

Ключевые слова: отношения между предприятиями, торговые сети, цепочка поставок, нечестные торговые практики.

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