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Competition in the Food Supply Chain – Contribution from Slovenia

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Competition in the Food Supply Chain

- Contribution from Slovenia –

1. Introduction

1. Slovenian Competition Protection Agency (CPA) has been the **designated enforcement authority for unfair trading practices** (UTP) in food supply chain since 2015. In this role, the CPA continuously monitors stakeholders in the agricultural and food supply chain (ranging from farmers to supermarkets) in order to prevent unfair trading practices, as well as to prohibit the use of certain contractual terms which are considered unfair and therefore illicit, even if both parties agree to them.

2. In 2015 as well the first Food supply Chain Relationships Ombudsman was appointed. Their main objective is to monitor the conduct of stakeholders in the food supply chain, and publish examples of good business practices on the Ombudsman's website. The Ombudsman also reports potential illicit actions in the food supply chain to the CPA.

3. Last few years following the COVID epidemic have been marked with new uncertainties that affect the food supply chain and food security at large. The war in Ukraine and ever increasing number of natural disasters (drought, floods...) due to climate change have placed the reliability of food supply chain in the centre stage. All these factors contribute(d) to raising food prices which drove extremely high rate of inflation.

2. Regulatory background

4. Firstly, it is important to note that as an EU member Slovenia adheres to EU standards and regulations wherever they apply, which includes any regulation in the agricultural field or in the field of food law in general; a large body of legislation has been created that is beyond the scope of this contribution, except where explicitly stated otherwise.

5. Food supply chain is regulated and defined in the Agriculture Act.¹ The food supply chain encompasses production (growing or rearing), processing, distribution, wholesaling and retailing from farmers down to the final consumer and shall be sustainably oriented as it affects the economy, health and environment with its existence and operation.² The Agriculture Act designates the CPA as the competent regulator for detection and sanctioning of unfair trading practices in the food supply chain and sets an extensive list of illicit actions in which undertaking with substantial market power (evident from sale volumes or annual turnover) takes advantage of another contracting party contrary to fair trade practice.³

¹ Official Gazette, no. 45/08, 57/12, 90/12 – ZdZPVHVVR, 26/14, 32/15, 27/17, 22/18, 86/21 – odl. US, 123/21, 44/22, 130/22 – ZPOmK-2, 18/23 in 78/23.

² Agriculture act, Art. 61č.

³ Agriculture act, Art. 61f.

6. The Prevention of the Restriction of Competition Act⁴ (PRCA) does not include particular provisions regarding food supply chain, however the Agriculture act refers to PRCA in this regard. The general provisions of PRCA are however used in cases of infringements (cartels, abuse of a dominant position) and mergers in agricultural sector as well.

7. Regulation of standards for packing, delivery, storage, and transport of food is part of a large body of food safety legislation. As mentioned above, this is a field of law heavily regulated by the EU with its regulatory body European food safety agency (EFSA). The national law that regulates food safety and sets the standards for foodstuffs and all the substances coming into contact with foodstuffs during manufacturing and transport is the Health Status of Foodstuffs and of Products and Substances Coming into Contact with Foodstuffs Act.⁵ This act is also the basis for numerous by-laws. The CPA so far hasn't detected any potentially anticompetitive behaviour based on the misuse or abuse of the food safety regulation, including the regulation regarding food packaging or transport.

3. Agricultural background

8. In order to sufficiently explain particularities and potential issues in the food supply chain in Slovenia, it is important to understand basic outlines of agriculture in Slovenia, which is marked by **a large number of small farms**, named agricultural holdings for statistical purposes. Despite Slovenia being one of the smaller countries in the EU (area of 20 273 km²), there are 68.331 agriculture holdings which utilize on average 6,9ha (69.000m² or 0,069km²)⁶ agricultural area per holding, according to 2023 data.⁷ According to the Agricultural Census of 2020, agricultural holdings with 20 ha or more of utilized agricultural area (UUA) represented only 6% of all agricultural holdings in 2020, but they utilized 34% of total UAA in the country. On the other hand, agricultural holdings with less than 3 ha represented 38% of all holdings, but utilized only 9% of total UAA. The middle size class with at least 3 ha and less than 20 ha of UAA accounted for 55% of all agricultural holdings and 57% of total UAA.⁸ It is reasonable to infer from this data that finding consensus and therefore leverage in any type of negotiation, might be rather challenging in a highly fragmented structure as described above.

9. One peculiarity of Slovenian agricultural background as it relates to food supply chain is also a well-developed gardening culture. According to 2020 statistical data almost 60% of households in Slovenia were growing vegetables for their own consumption in their

⁴ Official Gazette, n. 130/22 and 12/24.

⁵ Official Gazette, no. 52/00, 42/02 in 47/04 – ZdZPZ.

⁶ For comparison: Netherlands (total area 41.543km²) has about 51.000 farms with average size of 32ha (https://agriculture.ec.europa.eu/cap-my-country/cap-strategic-plans/netherlands_en); Austria (total area 83.878km²) has about 110.000 farms with average size of 20ha (https://agriculture.ec.europa.eu/cap-my-country/cap-strategic-plans/austria_en); France (total area 543.941km²) has about 456.000 farms with average size of 69ha (https://agriculture.ec.europa.eu/cap-my-country/cap-strategic-plans/france_en).

⁷ Statistical Office of the Republic of Slovenia (SURS), available at <https://www.stat.si/StatWeb/en/Field/Index/11>.

⁸ Statistical Office of the Republic of Slovenia (SURS), available at <https://www.stat.si/StatWeb/en/news/Index/9459>

gardens.⁹ While these vegetable gardens typically do not cover all the needs of a household and have to be supplemented with purchased produce (depending on season, quality of harvest, variety of produce...), the large percent of household gardens should be at least considered as a factor when describing food supply chain in Slovenia.

4. Purchasing of produce from farmers

10. Farmers relatively commonly sell their produce through markets, especially smaller farms with limited production capacities. Markets are subject to state and local regulation, which include the Trade Act¹⁰ and Rules on the minimum technical requirements for the conditions for the pursuit of trade¹¹ on state level, and decrees of the municipalities that wish to set-up markets on local level, so called market orders (*tržni red*). Market orders typically designate market areas, opening hours, rights and obligations of stakeholders, rules regarding order and cleanliness, fees, and similar.

11. Market orders typically also list the types of produce that can be sold at the specific market place (for instance, fruit and vegetables, dairy, meat, baked goods, forest fruit, herbs etc.) and who is entitled to sell them (for instance producers, who grow or produce their own food as part of a complementary activity on the farm, pickers of wild berries, flowers and medicinal herbs, traders and caterers, other individuals engaged in the economic activity of cottage industries and selling their own products etc.).

12. While many market orders refer to national legislation in terms of particular demands for specific type of produce, some market orders do include more particular requirements and standards for produce being sold. For instance, the Market order for the market of the *Zelenjavni trg* in Piran¹² explicitly prohibits the selling of milk and milk products, alcoholic beverages, cracked and dirty eggs, meat and meat products, live animals, seeds, seedlings and cane grafts, medicines and preparations of medicinal herbs, rare, protected and unknown herbs. Same market order also explicitly demands that lower quality produce must be marked as such.

13. Farmers (and other eligible vendors) can predict the prices of produce by following recent trends at a given market. One of the most established farmers' magazines in Slovenia since 1943, *Kmečki glas*, offers an online tool, *kmečka borza*¹³ that collects pricing data for produce, including different types of fruit and vegetables for which they source the pricing information weekly from central market of Ljubljana.¹⁴ Using this tool, the vendors can reasonably adjust their pricing expectation.

⁹ Statistical Office of the Republic of Slovenia (SURS), available at <https://www.stat.si/StatWeb/en/News/Index/9749>.

¹⁰ Official Gazette, no. 24/08, 47/15, 139/20 in 161/22.

¹¹ Official Gazette, no. 37/09.

¹² Official Gazette, no. 83/24.

¹³ Available at: <https://kmeckaborza.si/>.

¹⁴ Other pricing information is sourced from the European Commission (for instance beef, eggs) and from Agency for Agricultural Markets and Rural Development of Ministry of Agriculture, Forestry and Food (for instance pork, sheep meat, wheat).

5. The Wheat buying cartel¹⁵

14. The CPA detected from the media reports that in July 2020 five of the major wheat buyers (including mills, bread and pastry producers, and producers of meat products that use wheat as animal feed) in Slovenia supposedly met over an informal business lunch, where they discussed the wheat buying prices. The investigation revealed, that the meeting indeed happened on July 6th 2020, and that one of the attendees announced at the meeting to their competitors the wheat buying prices that they will offer to the wheat growers. Following the meeting, up to 17th July of 2020, all of the attendees changed their wheat buying price lists for all quality categories of wheat. The adjusted price lists were identical or included only minimal differences.

15. The CPA found that the meeting on 6th of July 2020 directly followed the annual Wheat conference (*Žitna konferenca*), which is a meeting of participants of the so called Slovenian wheat chain (*Slovenska žitna veriga*). Slovenian wheat chain was established in 2010 by the Ministry of Agriculture, Forestry and Food and it brings together stakeholders in the wheat market, in order to ensure better functioning of Slovenian wheat market. The EU Regulation 1308/2013¹⁶ as a basis for such interbranch organisation in the agricultural sector allows these organisations to pursue a specific aim which can include improving knowledge and the transparency of production and the market, including by publication of aggregated statistical data on production costs, prices, including, where appropriate, price indices, volumes and duration of contracts which have been previously concluded, and by providing analyses of potential future market developments at regional, national or international level.¹⁷ The same Regulation is also a derogation from article 101 TFEU,¹⁸ however price fixing is explicitly exempt from the derogation.¹⁹ The Slovenian wheat chain has been the target of much criticism throughout the years, even before CPA's case. The main critique applied to the price formation, where on one hand the wheat growers (farmers) claimed that the wheat buyers pressured them into unreasonably low buying prices, and on the other hand wheat buyers claimed that they cannot overpay wheat, just because it is grown by Slovenian farmers, when they can achieve lower prices on the free market of the EU (for instance in neighbouring Hungary or Croatia).²⁰

16. **In 2022 the CPA issued an infringement decision** and concluded that the five parties to the procedure agreed and exchanged information on the wheat buying prices, acted in a coordinated manner, and thereafter fixed the wheat buying price. This constitutes an agreement and coordination between the parties that restricts competition with an aim to prevent, restrict, or distort the competition in Slovenia and in significant part of the EU.

¹⁵ Case 3062-13/2020.

¹⁶ 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. 671–854.

¹⁷ Ibid. Art. 157(1)(c)(ii).

¹⁸ Ibid. Art. 210(1).

¹⁹ Ibid. Art. 210(4)(d).

²⁰ See for instance this article (in Slovenian): <https://vestnik.svet24.si/clanek/aktualno/zitna-veriga-se-lahko-pretrga-794588>.

The parties were found to be infringing article 6 of the PRCA*²¹ and article 101 of the TFEU.²²

17. All parties appealed the decision, so it is currently still under judicial review.

6. The pricing of ‘basket of basic foodstuffs’ – the CPA market research of 2023²³

18. Food prices started to increase very rapidly at the beginning of 2022. The largest contributor to annual inflation, 2.9 percentage points, was a 19.1% increase in food prices, with meat rising by 18.2%, bread and cereal products by 20.1% and milk, cheese and eggs by 24.4%.²⁴ The foodstuffs market has witnessed a concerted high increase in prices, fixing of identical prices for certain products by different retailers, and interruptions in deliveries due to unilateral changes in contractual terms and conditions affecting prices.²⁵

19. In order to combat the rapid price growth, the Ministry of Agriculture, Forestry and Food decided to carry out online and physical inventory of the prices, brands, quality marks and other indications of selected categories of foodstuffs. The physical inventory of selected 15 basic foodstuffs,²⁶ so called **basket of basic foodstuffs**, lasted from September 2022 to March 2023 and from June to December 2023. The results were published on a regular basis.²⁷

20. Much public criticism was directed against this measure, in particular relating to dishonest price reporting, announced visits of reporting staff in the pre-determined franchises of distributors, very temporary and small quantity extreme offers at reporting times to manipulate the overall reported price, and even allegations of cartel activities.²⁸

21. With the backdrop of government’s foodstuff price inventory the CPA conducted a market research in 2023, where it analysed the prices of selected foodstuffs²⁹ between

²¹ The PRCA in force at the time of issuing the decision (Official Gazette, no. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 – odl. US, 63/13 – ZS-K, 33/14, 76/15, 23/17 in 130/22 – ZPOMK-2) listed the relevant provision in Art. 6, whereas the current PRCA lists the relevant provision in Art. 5.

²² Treaty of Functioning of the European Union (OJ C 325, 26. 10. 2012).

²³ Summary of findings available at (in Slovenian): <https://www.varstvo-konkurence.si/informacije/novica/agencija-je-izvedla-raziskavo-cenovnih-razmer-na-trgu-izbranih-zivilskih-proizvodov/>

²⁴ Statistical Office of the Republic of Slovenia (SURS), available at: Consumer price indices, March 2023.

²⁵ Source (in Slovenian): Cene hrane in brezalkoholnih pijač so se v enem letu povišale skoraj za petino - RTV SLO.

²⁶ Pasta, pork meat, sunflower oil, sugar, gouda cheese, chicken meat, flour, fresh full fat milk, butter, white bread, potato, yogurt, eggs, apples, beef meat.

²⁷ The data is presently available at <https://www.primerjaj-cene.si/sl/hrana/>, however the original comparison website is now used for other purposes (<https://www.nasasuperhrana.si/zemljevid-lokalni-ponudniki-hrane/>).

²⁸ See for instance (in Slovenian): <https://n1info.si/novice/slovenija/ostra-kritika-kosarice-zivil-cene-nenavadno-nizke-sum-nedovoljenih-ravnanj/> or <https://www.rtvsllo.si/gospodarstvo/kmetijsko-ministrstvo-pravi-da-gre-za-konkretne-izdelke-katerih-cena-je-preverljiva/692957>.

²⁹ UTH milk, full fat milk, white flour, white bread, beef steaks, pork steaks, chicken filet, eggs, apples, lettuce.

august 2022 and March 2023. The goal of the market analysis was to detect possible infringements of the PRCA (cartels, abuses of dominant position) or unfair trading practices according to Agriculture Act. The CPA gathered data from seven retailers (supermarkets) and 12 food-processors.

22. The market research concluded, that the market under investigation is very transparent, due to the practice of the retailers to visit competitors' establishments and check prices, possibility to check competitors' prices online, and also due to the measures of Ministry of Agriculture, Forestry and Food. While exchange of information could constitute an infringement of the competition rules, it is reasonable to expect that the undertakings will adjust their pricing to their competitors. The market research detected a high level of competition between competitors, intense price adjustments to demand, as well as creating demand trough special offers. While the collected data in this particular market research did not lead to the conclusion that the similar pricing results from competition law infringements, the CPA continuous to follow the market conditions in this field as well.

23. The market research did however discover some illicit practices in breach of the Agriculture Act. After reviewing the contracts between retailers and food-processors, the CPA concluded that contracts regarding perishable goods often lack the mandatory contractual provision on the indicative quantity of the goods and the indicative timetable for delivery of the goods.³⁰ Review of the contracts also revealed a very poor level of managing contractual relations. In line with CPA's findings up to this point, the market research revealed that many contracts did not include all the prescribed contractual elements, some contracts were not concluded in written form and the business was conducted on a single order basis. It was found that food-processors reject concluding written agreements, in order to avoid long-term cooperation with retailers and to hold leverage in negotiations.

24. The CPU detected signs of other potentially illicit conducts, in particular improper return of unsold perishable agricultural and food products and other products, non-compliance with the payment deadlines laid down in the Agriculture Act, failure to take over the agreed quantities of products in accordance with the agreed purchase dynamics if it deviates from the agreement by more than 25 %, and the imposition of disproportionate or unfair contractual penalties.

25. According to article 51 of the PRCA the CPA may use data collected in a market research in potential infringement procedures, so the appropriate measures were taken against the potential infringers.

7. Advertising activities and potentially illegal demands of buyers to food suppliers – the CPA market survey 2024³¹

26. This year the UTP department of the CPA conducted a market research into marketing activities in the food supply chain. The goal of the market research was to find out whether there are any **unfair trading practices in relation to marketing activities**, or whether buyers (supermarkets) place illegal demands on food suppliers. In particular, the market research focused on the following violations of the Agriculture act: reimbursement for services not having been provided or services that have been provided but have not been

³⁰ A new requirement since amendment of the Agriculture Act in July 2022.

³¹ Summary of findings available at (in Slovenian): <https://www.varstvo-konkurence.si/informacije/novica/agencija-je-izvedla-raziskavo-marketinskih-aktivnosti-v-verigi-preskrbe-s-kmetijskimi-in-zivilskimi-proizvodi/>.

clearly pre-agreed in writing between the parties; reimbursement for ranking, retaining or expanding a range of products or individual products; reimbursement for placement of products on shelves at the points of sale, except when the parties conclude a written agreement on the placement of goods on particularly exposed sale areas; charging for promotional goods, except when the parties conclude a written agreement on promotional services to be carried out and the implementation of which can be proven.

27. CPA sent out requests for information to 23 food suppliers, including producers of fresh meat and meat products, wine, fresh fruit and vegetables, fresh shell eggs, fresh fish and milk and milk products. On the buyers' side (supermarkets) the CPA chose four undertakings with very different market shares – the biggest of the four 28,8%, second 22,3%, whereas other two with market shares around 5%, in order to review whether the market share affects the level of marketing payments and marketing activities.

28. Based on the data collected in the market research, the CPA concluded that a high likelihood of illicit practices according to Art. 61f of the Agriculture Act exists. In particular, the following requirements were imposed to food suppliers by the buyers:

- payment of super-rebates and discounts in case of meeting certain turnover threshold in designated timeframe, which could constitute reimbursement for services not rendered or for services rendered but not agreed in writing and clearly in advance between the parties (Article 61f(4)(1));
- discounts and financial compensation for inclusion of a new product in the buyer's product range and payments of discounts for the retention of the supplier, which could constitute refunds for the inclusion, retention or expansion of the product range (Article 61f(4)(2));
- payments of invoices or issuing of credit notes for the costs of marketing services in excess of the contractually agreed amounts (including vague definition of the marketing services and the prices for these services, as well as largely incomplete records of the realisation of the services), which could constitute a charge for the payment of the costs of promotional discounts, the payment of invoices for the costs of marketing services in excess of the contractually agreed amounts, advertising and marketing of agricultural and food products, without preceding clear, unambiguous, written agreement in the supply contract or in subsequent written agreements and without clearly demonstrable implementation and realisation (Article 61f(4)(4)).

29. If the CPA suspect non-compliance with the law based on the data collected in the market research, they are allowed to use said data in potential procedures against suspected infringers per article 51 of the PRCA. Based on results from this market research, the CPA is conducting further inquiries into potential illicit practices.

8. Conclusion

30. The CPA is active in the supervision of the food supply chain, in particular its UTP department. The legislative tools afforded to the CPU seem to be relatively effective in particular in combating illicit practices, as listed in Art. 61f of the Agriculture Act.

31. Market researches in the food supply chain can also trigger investigations in potential illicit practices, as was demonstrated above, so they also represent a useful tool for regulation.

32. Particularities of Slovenian agriculture combined with global challenges present an ever more relevant background for continuous monitoring and regulation of conditions in the food supply chain.