

Legal Alert

Amendment of the Act on Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof

Since its inception, Act No. 395/2009 Coll. on significant market power in the sale of agricultural and food products and abuse thereof (the "Act") has been criticized for its lack of transparency and clarity, which enables varying interpretations of some of its provisions. According to its proposers, the new bill, promulgated in the Collection of Laws under No. 50/2016 of 5 February 2016, is designed to remove these problematic aspects while making the work of the Anti-monopoly Office ("AMO") more effective in its oversight of adherence to this law.

From a substantive perspective, the bill revises the law in three key areas: (i) making basic terms and definitions more precise, (ii) setting mandatory terms for contracts between customers and vendors and penalties for non-adherence to these terms, and (iii) newly defining the *res gestae* of abuse of significant market power. The bill is scheduled to enter into force on **6 March 2016**.

Significant market power

A new definition of significant market power is introduced: a customer position enabling that customer to **unfairly force an advantage over vendors** when purchasing food or receiving / rendering services associated with the purchase or sale of food.

The amendment preserves the presumption that significant market power is wielded by a customer whose total

turnover in the CR exceeds **CZK 5 billion for the last completed fiscal period**. After the amendment, however, only turnover from the sale of food and related services will be relevant to the assessment of significant market power. This value threshold will now apply not only to individual customers, but also to customers who belong to a holding or what is known as a purchasing alliance.

Mandatory contract terms

The most important changes the amendment introduces comprise **mandatory terms for contracts between a customer with significant market power and a vendor**. In compliance with the **new § 3a of the Act**, these are:

- ▶ **compulsory written form** of a contract
- ▶ determination of the **method of purchase price payment**, the **payment maturity** (*where agreeing on or applying a maturity period of longer than 30 days from invoice delivery constitutes the banned abuse of significant market power*) and the **amount of a discount** on the purchase price or method of its quantification, where given
- ▶ **the amount of all vendor monetary performance** (*totaling in the aggregate no more than 3% of annual revenue of the vendor for the last completed fiscal period lasting 12 months for food supplied to an individual customer in the year in which the financial performance was rendered*)
- ▶ the period (or method of its determination) for supply of the subject of purchase and **determination of its volume for the stipulated period or the volume of individual supplies of the subject of purchase**
- ▶ where **services related to the purchase or sale of food** are concerned, the method of cooperation in their receipt and provision as regards the subject

matter, scope, method and period of performance, the price or manner of its determination (*the arrangement of fictitious or artificial services is included in cases of banned misuse of significant market power*)

- ▶ the **validity period of the guaranteed purchase price**, which may not exceed **3 months from the date of the first delivery** of food for which the purchase price was agreed
- ▶ the method of **assigning a receivable** (*receivables may not be assigned in a manner that excludes or limits a vendor beyond the scope of the law in the Civil Code*).

Contracts executed before 6 March 2016 (i.e. before the effective date of the amendment) must be made compliant with the foregoing principles within a 3-month implementation period, i.e. by 6 June 2016.

We add for the sake of completeness that absence of the stipulated terms and/or mandatory written form of the contract shall constitute an administrative delict for which **a customer may receive a fine of up to CZK 10 million or 10% of turnover, respectively, for the last fiscal period.**

Abuse of significant market power

The amendment also replaces the current confusing conception of the *res gestae* (prohibited acts) of abuse of significant market power in a considerably more concise demonstrative list. **Now, abuse of significant market power committed by a customer may consist, inter alia, in:**

- ▶ negotiating or applying **contract terms that create a significant imbalance in the rights and obligations of the parties**
- ▶ agreeing on or receiving **any payment or other performance without adequate (actual) consideration**
- ▶ claiming or receiving any **payment or discount** whose amount, subject and scope of provided consideration for this payment or discount were not **agreed in writing prior to supply of the food or provision of the services** to which the payment or discount pertains
- ▶ negotiating or applying **pricing conditions that result in the tax document for payment of the purchase price for the supply of food failing to include the final purchase price** after all agreed discounts with the exception of pre-agreed volume discounts
- ▶ negotiating or claiming **payments or another consideration for the acceptance of food for sale**

- ▶ negotiating or applying a **maturity period for the purchase price of food of longer than 30 days** from invoice delivery
- ▶ negotiating or claiming **the right to the return of purchased foods**
- ▶ **discriminating against a vendor** by unjustly negotiating or applying different contract terms.

Should the AMO ascertain a violation of the ban on the abuse of significant market power, it will issue a decision **banning such conduct in future** or enjoining the customer to take corrective measures by a stipulated deadline for the purpose of eliminating the illegal situation.



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This information in this bulletin is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made. Nor should the information in this bulletin be considered an exhaustive description of the given matter and its possible ramifications. We also note that legal opinion varies regarding some of the issues raised in this bulletin due to ambiguities in the relevant provisions. Thus, it is possible that an interpretation other than the one presented here will prevail in future.

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