On abuse of (plain) market power and of so-called significant market power
Josef Bejček, ASCOLA Conference, Tokyo, May 2015

1. Introduction

The phenomenon of "significant market power" has been debated for years. Indeed, while such market power cannot be equated to dominance, it can nevertheless break the ideal equilibrium in relationships between business partners. The resulting imbalance is not structural in nature, reflected in the prohibition of abusing dominant position and consumer protection, but rather specific inequality of powers, which may be both used and abused by the stronger party. Numerous studies have been made especially on buying power and it is also not uncommon to adopt or at least contemplate legislative measures in this respect. Such imbalance of powers appears to be especially alarming in the field of distribution of agricultural and food products, which has become highly concentrated lately due to changing consumer demands and customs,[1] all that to the detriment of farmers and food producers. The well-organised agricultural and food lobby certainly also has certain influence. The purpose-driven nature of the required measures does not always accommodate more general interests and values and often even neglects the need for comprehensibility and clarity of law and its consistency. However, laws that lack clear concept or are even incomprehensible cannot be rescued by arbitrary and even inherently contradictory interpretation.[2] I fear that this is also probably true of the circumstances of the adoption, legislative and technical quality, interpretation and implementation of Czech Act No. 395/2009 Coll., on significant market power in the sale of agricultural and food products and its misuse (hereinafter the "Significant Market Power Act", SMPA).

In this contribution to the ongoing debate, I shall first deal in general with the relevant notions and terminology, as well as the political context of the relevant laws and competition. Indeed, there are primarily doubts as to the legitimacy of the provisions concerning abuse of significant market power and the aspects of determining or inferring their objective. Then I shall turn to certain provisions of the applicable law and, in conclusion, I will comment on and evaluate its amendment which is currently being prepared and provide certain topics for discussion.[3]

2. Issues related to terminology

In the SMPA, the legislature embarked on the dangerous path of laying down self-sustaining legal definitions, which are moreover ambiguous. Interpretation of various terms by administrative authorities has yet to be subjected to judicial review and, consequently, any arguments will be hypothetical and abstract.

2.1. Significant market power – towards all, or towards economically dependent party only?

[1] Especially shopping for all necessities under one roof, or *one-stop-weekly-shopping*.

[2] A charming observation of a child from Carroll's Alice in Wonderland comes to one's mind in similar situations. Humpty Dumpty said that when he used a word, it meant just what he chose it to mean – neither more nor less. The question is, answered Alice, whether you can make words mean so many different things. The question is, said Humpty Dumpty, which is to be master- that's all. Cf. http://sabian.org/looking_glass6.php.

[3] This is part of the GA task reg. No.: 13-14244S (Principle of Equality and Protection of the "Weaker Party" in the Conditions of Economic Imbalance and Information Asymmetry of Entrepreneurs through the Means of Public Law); based on earlier draft Tržní síla (prostá) a tzv. tržní síla významná, Antitrust 4/2014.

Significant market power is defined in Section 3 (2) of the SMPA as a dependent position of a supplier vis-à-vis a buyer within the market in specific commodities, which has arisen as a result of the market situation – i.e. spontaneously. Of course, "significant" market power can also generally arise in the opposite direction, i.e. in terms of a buyer's dependency on his supplier; however, this case is not covered by the definition of the statutory term.

Where a buyer becomes dependent on a certain supplier as a result of unlawful steps taken by the supplier(s) (abuse of dominant position, prohibited agreement restricting competition), the resulting situation can be dealt with under the PCA. Consequently, under the applicable SMPA, a significant market power may only arise on the part of the buyer, if the latter is able to enforce unilaterally favourable business terms as a result of existing market conditions.[4]

There is a more general dispute whether the concept of significant (but still subdominant) market power is to be interpreted in *objective or subjective (individual) terms*. Individual approach stands for an inquiry of a particular relationship unlike objective concept that relies on legally set criteria of significant market power; meeting these criteria means that the buyer´s power will be assessed as significant towards all commercial relations between him and all of his suppliers (which is the recent Czech approach). This objectivised stance towards significant market power may be labeled as „qualified subdominance".

Some examples of solving this issue in objective terms are practiced in many countries. So for example in Hungary (according to the Trade Act from 2006) identifying significant market power is according the net turnover criterion (including mother- and daughter companies). Exceeding 100 bil. of forints means the status of significant market power without others. Even without the criterion if the buyer or any grouping tehereof may be found in an unilateraly adavantageous position towards suppliers. The abuse is defined in a rather vague and economically dubious and fuzzy way: „the supplier does not receive any benefit from the economic results of the large-scale selling".

In Lithuania the definition of SMP presupposes owing at least 20 stores with food products with selling area 400 squared meters at least , and total turnover approximately 114 mil. €.

Latvia has introduced subjective and dubious concept of dominant position generally in retail sector: proving market power of the merchant towards his suppliers is sufficient without necessity to prove it towards the rivals and consumers (as it is normally the case in dominant position).

Italian Act no 27 of 24 March 2012 accents *fair competition* in the food and agricultural sector. The retailer´s unfair behaviour does not necessarily need to be anticompetitive in terms of antitrust, it is sufficient not to achieve dominant position but only to apply unfair trading practices that are found to be against the public interest. The interpretation is nevertheless rather restrictive and the national competition authority may deal with the abuse of economic dependence only inasmuch it amounts to an abuse by a dominant company.[5]

Finland has specifics stemming from extremely high concentrated food retail sector. Two major grocery retail chains ensure more than 80% of the turnover at the grocery market. Therefore a „tailor-made" regulation has been approved in 2013: any grocery chain that achieved more than 30% share in the national market is considered to hold a dominant market

[4] The notion of business terms and conditions is evidently used more broadly than "indirect contractual arrangement"; thus, it is an "unilaterally" favourable relation between the rights and obligations of the parties for the buyer's benefit without necessarily stipulating them in the institutionalised business terms and conditions in the sense of Section 1751 of Act No. 89/2012 Coll. (the Czech Civil Code).

[5] BUTTÁ, A., PEZZOLI, A. *Buyer Power and Competition Policy: from Brick-and Mortar Retailers to Digital platform*, Economia e Politica Industriale, Vol. 41, 2014/4, p. 159 – 179.

position including its „special responsibility". The weaker parties facing these chains are moreover exempted from the general ban of cartels.

German regulation in Section 20 Art. GWB does not need any special category of bargaining power for food retail sector. Hindrance and discrimination is also generally prohibited to undertakings with a relatively strong market position (*markstarke Stellung*) i.e. especially in favour of small and middle-sized enterprises depend on the other party to an agreement. It is a clear concept of relative economic dependence. No pretending or fiction of market dominance for a subdominant undertaking.[6]

Greece prohibits an abuse of economic dependence according to German example. The subdominant undertaking may moreover infringe prohibition of an abuse of economic dependence even without any existence of contractual relationship between the parties.
Austria applies a concept of superior market power of the buyer – if the suppliers have to rely on maintenance of the business relationship in order to avoid serious economic disadvantages.

In France, a subdominant firm may be considered to held another undertaking in its dependency even if the former does not have a dominant position on the purchasing market.

These latter examples clearly show, that rather relative economic dependence and relative bargaining power (subjective approach) in particular case (unlike objective market power) is being taken into account in these countries.

By contrast, new nabulous concept of „objective" significant market power distinct from monopoly and dominance has been introduced in some other countries, including the Czech Republic. According to these approaches, significant market power does not reach the threshold of dominance, nevertheless it is able to distort competition as such (not only in terms of its fairness).

Portugal regulates fairness of contract terms in food and agriculture industry even without any qualifications of market power. Portuguese Act No 166/2013 on restrictive commercial practices does not pretend protection of competition and declares a new competence of the administrative *Body for food and economic security*. The goal of the act is to directly protect economic entities and to secure transparency of commercial relations even if economic competition is not necessarily distorted. Basically all undertakings are involved regardless their market power. There is an administrative way of securing fairness.

Despite grammatical interpretation of the Czech regulation that is in favour of the relative concept of economic dependence between a certain supplier and a certain buyer the Office for the Protection of Competition (hereinafter referred to as "Office" has opted for the objective concept. In fact, it equates to extension of the scope of personal applicability of a public-law rule, which can be contested – if nothing else – in terms of constitutionality.[7]

The adoption of said "absolute concept" also entails an important consequence related to a shift in the *aim* of the law. Indeed, this objective concept has only been adopted for pragmatic reasons at a later date (because the relative concept would be difficult to apply, and would reduce or even exclude the applicability of the SMPA) – it was originally intended to

[6] The German BGH (Federal Court) clearly distinguishes between dominant position and economic dependence of small and middle-sized undertakings as a kind of „relative dominance" based in bilateral relation between individual byuers and sellers (subjective concept). Cf. KËLLEZI, P. *Abuse below the Threshold of Dominance? Market Power, Market Dominance and Abuse of Economic Dependence,* in MACKENRODT, O., GALLEGO, B.C., ENCHELMAIER, S. (Eds.): *Abuse of Dominant Position: New Interpretations, New Enforcement Mechanisms?* MPI Studies on Intellectual Property, Competition and Tax Law, Springer Verlag, Berlin Heidelberg 2008, pp. 61-62, 77.

[7] Under Art. 2 (2) of the Charter of Fundamental Rights and Freedoms, State authority may only be asserted in cases and within the bounds provided for by law and only in the manner prescribed by law. According to Art. 1 Sec. 1 of the Act 273/1996 Coll. on the Scope of Competence of the Office, the Office is a central administrative body, its purpose is to maintain and protect *competition* against its prohibited restriction.

use the relative concept. Without any formal amendment to the law, its personal scope was *de facto* extended and its aim was actually changed *ex post*. Indeed, it can be inferred from the wording of the law that public-law means are to ensure substantive supervision over the correct relationships between *specific* entities in asymmetrical bargaining positions. However, the "absolute concept" of significant market power puts into this position each and every buyer who is capable of enforcing unilateral business terms only vis-à-vis certain suppliers; nonetheless, this line of interpretation assigns him significant market power in respect of all suppliers, even if they are dominant.[8]

Consequently, the application of the SMPA should also ensure that an entity with actual market power (dominance) on the supply part of the transaction cannot be forced to accept unfavourable terms by someone who lacks real market power, but has "significant market power". However, this is inherently contradictory and denies not only the function of market self-regulation, but also the sense and function of the SMPA, in whatever way we understand it.

There are at least four possible options.

Option 1: if the sense of the law is to protect the weaker party and a dominant undertaking on the supply part is provided by a buyer considered to have significant market power with equally "unfavourable" terms as a sub-dominant seller, in what sense are the terms unfavourable? Is the dominant undertaking in a position of a weaker party just like its sub-dominant rivals simply because the buyer on the other side of the transaction has "significant market power"?

Option 2: if "fair competition" is to be protected, then applying the same or similar business terms in a non-discriminatory way to all the suppliers cannot be considered unfair – in contrast, is it not unfair that the bigger supplier does not enjoy better conditions than the smaller suppliers due to economies of scale? The fairness as such of the content of business terms has to be assessed according to contract law and to the private law against unfair competition in a particular case, rather than according to an rough and global public law means. As some scholars argue, this approach is more value-based and sometimes with weak or no economic evidence at all, so the assessment may stem more from ideology than from economics.[9]

Option 3: if the existence of competition is to be protected, the PCA cannot apply to a sub-dominant buyer, because it lacks structural market power that could be abused to endanger, distort or exclude competition in terms of its existence. The purpose of the in legal and political terms is thus unclear and the vicious circle brings us back to options 1 and 2, which however do not provide a satisfactory answer.

Option 4: Hypocrisy in setting or admitting the regulatory goals; in fact, redistributive goal along the vertical chain in the food retail sector is pursued, i.e. a kind of a "battle of egoisms" in favour of the well-lobbied egoism of the suppliers. Although, it is a legitimate

[8] A senior employee of the Czech Office even stated on 12 November 2014 at the St. Martin conference organised by the Office that, in his opinion, a buyer with a turnover of CZK 5 billion or more can be deemed to have a significant market power in respect of all suppliers and that even a large supplier with a turnover exceeding CZK 5 billion (like Coca Cola and Prazdroj) is not capable of forcing such a buyer into different conditions than small suppliers. This represents a very extensive interpretation of the term "significant market power" that should, in fact, exist on the part of a demand sub-dominant towards a supply dominant.

[9] See LAO, M. *Ideology Matters in the Antitrust Debate*, Antitrust Law Journal, Vol. 79, Issue 2 (2014), p. 666. For „the *process* of competition itself is also deemed important because of its tendency to enhance the competitive opportunities of start-ups and other less established firms" (ibid, p. 677), even the arbitrage between fierce competition and hard barganing on one side, and moral condemnation of unfair conduct on the other side is value-based and more or less matter of beliefs rather than issue of rational arguments. Therefore policy prevails and a „honest conversation on what values should matter" would be preferred to discussions on „..economic theories as a proxy for discussion" (see ibid. p. 685).

political goal, it should not be disguised and pretended as a kind of protection of competition or of efficiency.

Contract law has enough troubles with assessing "(un)fairness" stemming from natural (yet suspicious) inequality of bargaining power and is in fact not able to cope satisfactorily with deciding what is fair at all, especially in substantive terms.[10] Protection of certain undertakings rather than competition would be the result presupposing different standard of treatment because of mere size of an undertaking. It is very controversial in case of dominant undertakings[11] and even more with regard to subdominant undertakings with stronger bargaining position. Ex post judicial or administrative distinguishing between agreements "which are the result of ´mere commercial pressure´ and those which are the consequence of unfair exploitation"[12] would introduce uncertainty, infringement of the freedom of contract and autonomy of the parties and conflicting (redistributive) social goal.

2.2. Possible overlaps with other market positions

Significant market power as generally defined by the law can overlap with other positions and characteristics, such as, in particular, market power, economic dependency, buying power, bargaining power, economic position or business fairness. Significant market power is neither the same as market power nor identical to the other characteristics referred to above.

The powers of individual parties to a business transaction are conditional on a number of circumstances. The latter either cannot be determined at all or are very difficult to estimate. The parties may have different "gross" (and somehow measurable) general economic strength (e.g. profit, turnover or overall assets). They can vary in access to information and its understanding (information symmetry or asymmetry), in qualifications and expertise, in greater need of the other party than[13] vice versa, in self-confidence, in risk acceptance, etc.

The demand power (buying power) can be objective – market power on the supply side *(stricto sensu)*. It is determined using objective indicators[14] within a certain relevant market as such, regardless of the specific partner. Demand power of major distributors makes them *gatekeepers*, i.e. buyers that cannot be fully replaced. Dependency of the producers on these distributors is also augmented by the fact that the latter have effective logistics, packaging and transport systems and, moreover, sell a constantly increasing number of products under their own private labels,[15] which results, along with economies of scale and high switching costs connected with a change of the distributor (if at all possible), in further dependency of producers on specific distribution channels.[16] Buyer power - unlike seller market power - may not inevitably reduce consumer welfare; it may cause lower input prices. If the buyers face fierce competition in downstream markets, these benefits may be passed on to consumers.

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[10] See AKMAN, P. *The Concept of Abuse in EU Competition Law*, Hart Publishing, Oxford and Portland 2012, p. 166 ff.

[11] Ibid, p. 169.

[12] Ibid, p. 170. These attempts to judge the behavior of the marketplace by the ethics of the courtrooms to the detriment of economic pressure (Eastbrook´s opinion quoted ibid, p. 183) naturally weaken the role of contract and of market autoregulation.

[13] In a specific context, the partner who is more careful can be the weaker party in contact with a risk-loving "player", despite the fact that purely economic aspects need not suggest this.

[14] Cf. Section 10 of the PCA, similarly Art. 102 TFEU.

[15] In this respect, cf. MÖSCHEL, W.: *Market Definition with Branded Goods and Private Label Products*, E.C.L.R. 2014, Iss. 1, p. 29 et seq. He points out, amongst other things, that products sold by businesses under their own label are sometimes identical to those sold by the same producer as an original branded product. Nevertheless, a distributor of goods under a private label continues to be a distributor, and a producer of branded goods continues to be a producer and not distributor of the goods he sells.

[16] Cf., in general, Hauptgutachten 2010/2011, No XIX, Monopolkommission: *Stärkung des Wettbewerbs bei Handel und Dienstleistungen*, Nomos Verlag, Baden - Baden 2012, p. 369 et seq.

Based on practical approximation at the level of the European Commission, it was found that a buyer has a demand power if the loss of such a buyer would mean a greater than 22% drop in the producer's (supplier's) turnover.[17] However, this must be examined specifically and in relative terms, i.e. in relation to a specific supplier, rather than in objective terms, as is true of interpretation of so called significant market power.

The notion of *bargaining power* is broader – this term can also be reasonably used in a specific situation involving two or more partners, neither of which need to have a dominant position (objective market power). Bargaining power is an implied, intuitively and contextually extrapolated notion rather than a clear measure of the content and nature of the relationships between the parties; the existence of bargaining power can be inferred from its symptoms such as the necessity to arrive at an agreement with the other party (i.e. the lack of a reasonable alternative) or the impossibility to agree on or modify the proposed contractual terms and conditions.[18]

Bargaining power is a mere potentiality which in reality need not contain any problematic elements. Just the more powerful businessmen can negotiate and keep to themselves greater individual discounts or other more favourable terms than less powerful players.[19] The presence of duress distorting the will of the other party or even excluding it completely is also possible outside the above-mentioned potential power constellations. It has private-law consequences due to the violation of the principle of the autonomy of will (or good morals and fairness) as well as public-law (administrative-law or criminal-law) consequences in case of infringement of important public interests. There is no clear connection between demand power and bargaining power. Demand power is not determined solely by the size of the buying entity. Smaller businesses, too, may have considerable bargaining power if consumers in their region do not have any other alternatives.[20]

Legal regulation governing behaviour of entities in a potentially asymmetric power situation in bargaining will necessarily find itself "treading on thin ice", in particular due to the vagueness of the criteria for intervention and the possible arbitrary nature of such interventions, as well as because of the risk of negation of the contractual autonomy, the legal protection of ownership rights and market self-regulation through competition. This is also the case of the SMPA , which focuses on bargaining power without interpreting it in the sense of relative economic dependence of individual partners. On the contrary, the interpretation moves toward a status-objective view (quasi-dominance, qualified sub-dominance). This is joined by information asymmetry – while suppliers are quite transparent to the buyers in terms of economics and technology, this is not true vice versa. The transaction costs associated with a change of supplier are usually minuscule in comparison to the costs associated with a change of the distribution channel on the part of the producer or supplier.

Essentially, bargaining power is a result of an interplay of three factors:[21] external possibilities on the part of the buyer, external possibilities on the part of the seller and the bargaining efficiency. The latter of these factors may considerably influence the result if the external possibilities of both parties are equal.

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[17] Cf. HAUCAP, J.,HEIMESHOFF, U.,KLEIN, G.J.,RICKERT, D., WEY, CH.: *Die Bestimmung von Nachfragemacht im Lebensmitteleinzelhandel: Theoretische Grundlagen und empirischer Nachweis*, WuW 2014, Nr. 10, pp. 955-956.

[18] Similarly,BERNHIZER, D. D. *Inequality of Bargaining Power*. University of Colorado Law Review [online]. 2004, vol. 76, pp. 63 - 64.

[19] Cf. NIELS, G. JENKINS, H. KAVANAGH, J. *Economics for Competition Lawyers*, Oxford University Press, Oxford 2011, p. 166.

[20] Srov. HAUCAP, J. ET AL., cited work, p. 947.

[21] Srov. OECD: *Policy Roundtables Monopsony and Buyer Power*, DAF/COMP (2008) 38 of 17 December 2009, pp. 39 – 42.

The formerly promoted and in relative terms devised notion of *"economic dependency"* does not appear in the SMPA anymore and the Office has rejected it both in its explanatory memorandum on the amendment and in the statements of reasons for its decisions. Economic dependency is a specific relative relationship that is pre-determined neither in terms of the sector (food industry and agriculture) nor structurally (limited only to suppliers), or in terms of absolute values of an entity's turnover or relative values of its market share. A specific relationship-determined economic dependency contributes to the creation of an unbalanced contractual relationship much more than the bargaining power or demand (buying) power. Depending on the given case, the buyer need not necessarily be economically dependent on the dominant partner, while in a different case another buyer may be economically dependent even on a sub-dominant partner. For this reason, "economic dependency" should be determined and investigated; however, this is very demanding and difficult in terms of obtaining evidence, which is obviously the reason why the Office chose to deviate from the original position.

The notion of economic dependency would, similarly to the notions of "good morals" and "good morals in competition" and "fair business conduct", provide a possibility for public-law enforcement of fairness in commercial contracts, where private-law protection could potentially be unenforceable. The currently dominant "objective" interpretation[22] maintains that one party wields significant market power (the buyer according to Czech law) on the basis of statutory criteria, which means that if the buyer's market power is typologically classified as "significant" on the basis of the law, the will apply to *all* commercial relationships between this buyer and all its suppliers.

2.3. Qualified sub-dominance

The basis of the "objective concept" of significant market power lies precisely in the fact that the buyer's position on the market generally (!) and regardless of relation to particular business partner represents a significant distribution channel for the supply of the suppliers' products to the consumers, and that the buyer could take unfair advantage of this position. The term "*qualified sub-dominance*" can perhaps be used in this respect.

However, this is far from being the only possible solution. Laws of many countries which stipulate special rules for non-dominant competitors are usually based on their market (buying) power (similarly to the Czech SMPA) or on the other competitors' "economic dependency" on them.[23]

Germany uses a non-specific regulation with no special focus on sub-dominant competitors – the German GWB (Act on the Protection of Competition[24]) does not interfere with the concept of dominance to protect suppliers from retail chains, but stipulates (in the form of a very general clause) that businesses may not use their greater market power against small and medium-sized competitors in order to achieve unfair restriction of these competitors.

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[22] Cf. DRBAL, A.: *Z rozhodovací praxe Úřadu pro ochranu hospodářské soutěže (From the Decision-making Practice of the Office)*, Antitrust 2013, Iss. 4, p. 142; HANSLIANOVÁ, B., POKORNÁ, A.: *Institut významné tržní síly dle zákona o významné tržní síle (Concept of Significant Market Power Under the SMPA)*, Informační list ÚOHS 2013, Iss. 2, p. 9 et seq.

[23] Cf. POKORNÁ, A.: *Specifické veřejnoprávní regulace odběratelskododavatelských vztahů ve státech Evropské unie a zákon o významné tržní síle (Specific Public-Law Regulations of Buyer-Supplier Relations in EU Member States and SMPA)*, Informační list ÚOHS 2013, Iss. 2, p. 7.

[24] Section 20 GWB, amended paragraphs 3 and 4, the amendments coming into effect on 1 January 2013.

In terms of economic evaluation, such limitation includes, in particular, situations where a small or medium-sized competitor is required to sell food products for a price lower than the selling price for which the buyer subsequently resells the products (it also applies in case of other products or services, if this happens regularly), or situations where a business charges to a small / medium-sized competitor with whom it competes on a subordinate market a higher price for the supply of products or services than the price offered for these products and services by the business on such subordinate market, unless there is an objective reason for this.[25]

The general nature of the German legal regulation and the broadening of its effect to include all, not just the dominant competitors (i.e. regardless of their size) should establish protection against unfavourable terms and conditions for all entities dependent on a competitor requesting such terms.[26] The German legislation reflects the change in power relationships between the dominant industrial enterprises and highly concentrated retail which had been under way since the 1980s. Nevertheless, the general wording does not give rise to fears in Germany that unfair contracts could be immune to challenge from small and medium-sized businesses.

The general approach in the form of a general clause of the Act, which is implemented predominantly through case law, is thus possible, although it contains a discretionary elements such as reasonability, fair consideration and appropriateness. The reluctance to introduce a new kind of regulation without clear boundaries was based mainly on the unreliability of the theoretical basis of economic dependency; it is unclear where it begins and where it ends, which raises doubts about the legitimacy of any measures in this area and leads to a strong tendency to avoid it on the part of the regulatory authorities.[27]

However, the legislators in the Czech Republic have not avoided it and adopted a seemingly clearer and casuistic regulation through the SMPA, whose economic justification is nevertheless no more precise than "economic dependency" had ever been. The turnover criterion of CZK 5 billion on the part of the buyer[28] is only a rebuttable assumption deemed to be only one of the discretionary indicators[29] of the existence of significant market power. The

[25] An interesting trend (probably not a long-term one) can be observed in Germany since the end of 2007. Since then, businesses with a demand power were prohibited from demanding conditions in business relations that brought them advantages without a substantiated reason – not only from small and medium-sized enterprises, but from *anyone* regardless of size. Thus, even large producers enjoyed the benefits of legal protection towards those with demand power. The German Monopolkommission criticised this approach (see Hauptgutachten 2010/2011, p. 380), because large businesses, unlike small ones, are able to defend themselves against unjustifiable requirements.

[26] Cf. RITTER, S.: *Regierungsentwurf zum Gesetz zur Bekämpfung vom Preismissbrauch im Bereich der Energieversorgung und des Lebensmittelhandels*, WuW 2008, Iss. 2, p. 143

[27] Cf. SCHEELINGS, R., WRIGHT, J.: *"Sui generis"? An Antitrust Analysis of Buyer Power in the United States and European Union,* 05-30, accessed 23 November 2009 at the Social Science Research Network: http://ssrn.com/abstract_id=800886 , p. 14, p. 29. Unambiguous and uncompromising as it is, the refusal of this regulation by the Bulgarian Competition Commission of 13 July 2010 in response to the Communication from the Commission of 28 October 2009 on a better functioning food supply chain can serve as *pars pro toto*. It is stated in it that the matters in question fall beyond the protection of competition and hence outside the Commission's competence. According to the Bulgarian declaration, the concept of significant market power established in numerous EU Member States proved rather ineffective. Special laws introducing such a regulation also entail the risk of an opposite effect on small suppliers they should protect, namely that supermarkets will divert their demand to neighbouring countries with a less stringent regulation and that they will prefer bigger suppliers. It finds a solution in special laws on fair competition, information campaigns and promotion of a code of conduct, as well as in forming professional associations of small suppliers protecting the members' rights and competition rules (cf. http://ec.europa.eu/competition/ecn/brief/04_2010/bg_supermarket.pdf, accessed 15 March 2012).

[28] Cf. Section 3 (3) of the SMPA .

[29] Cf. HANSLIANOVÁ, B., POKORNÁ, A.: cited work, p. 12.

decision of the Office concerning whether or not a buyer wields significant market power is essential; not meeting the turnover limit is not a guarantee of non-intervention and, conversely, excess of the limit does not predetermine that significant market power exists. Acts listed in the annexes to the SMPA are not prohibited *per se*, but only to entities who have been found to wield significant market power.

2.4. Unilaterally unfavourable terms and conditions

From the viewpoint of competition, it is important whether a party may realistically avoid the influence of the stronger party (i.e. a business transaction – if the weaker party exposes itself to such influence, this is considered to be its voluntary decision), or whether the weaker party has to submit to it because of economic or other reasons. There is a further, more exact division into situations where a single individual party is in a weaker power position vis-à-vis another individual party, and situations where a party is in a stronger power position vis-à-vis a whole group of (all or most) its partners.

A moral evaluation of the contents of the terms and conditions (their advantageous or disadvantageous nature) represents a different area of consideration, which is unrelated to the protection of competition, despite its possible association with the fairness of competition. *Inequality is natural and necessary in a market economy*; it serves as a source of competitive pressure, struggle for a competitive advantage, the clash of motivations and a prerequisite for measuring the results on the market. Elimination of all inequality between the parties is neither desirable nor possible: it would mean elimination of the driving force behind competition and giving up on the market's capacity for self-regulation also in areas where it undoubtedly exist. Moreover, the suppliers can only be a "biased judge" of their own situation – it is common that great demand and bargaining power may be inconvenient to the suppliers, but the fact that it "reins them in" may result in lower consumer prices[30] and improvement of the products,[31] and thus contribute to consumer welfare.

The imbalance in relationship between the suppliers (manufacturers) on the one part and retail chains on the other part is generally evaluated completely by rote and one-dimensionally; however, this not always corresponds to the reality. Firstly, the distributors are customers of the suppliers, who would be unable to reach the end consumer at given costs without their help. Although this understanding is prevalent, the structure of the relationships is more complicated. Secondly, in relation to the supplier, the distributors are also in the position of "vendors" of their sales premises, know-how and image (for which they compensate through listing fees, "slotting fees", contributions for advertising, etc.). Thirdly, the distributors represent competition to their suppliers if they sell the supplied products under their own private labels.[32] All these aspects must be considered individually and in context in any analysis of bargaining power.

While factual inequality is a natural state of affairs, the fiction of equality and correction of inequality through equality of rights represent an artificial state of affairs. Cases of glaring *material* inequality preventing or severely hindering the exercise of a right are addressed in private law by the principle of substantive correctness of a relationship (which involves evaluation from the viewpoint of good morals, fair business conduct, prohibition of

[30] According to DOBSON, P.W., CLARKE, R., DAVIES, S., WATERSON, M.: *Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union*, http://europa.eu.int/comm/dg04/publications/studies/bpifrs, p. 38.

[31] INDERTS, R., WEY, C.: *Buyer Power in Distribution*, in Colins, W.D. (ed.): Issues in Competition Law and Policy, ABA Antitrust Section Handbook 2008, p. 18.

[32] Cf. DOBSON, P.W.: *Exploiting Buyer Power. Lessons from the British Grocery Trade*, Antitrust Law Journal 2005, vol. 72, p. 538-539.

abuse of a right, etc.) and also in public law (e.g. prohibition of abuse of market power under the PCA, prohibition of abuse of economic position under the Act on Prices and some merits of the criminal offences).

This second public-law-group includes the SMPA , which formally declares an interest in protection of competition on a relevant market,[33] but in reality represents rather a smoke screen hiding the real aim – *a group protection* of suppliers of agricultural and food products against all current or potential buyers, regardless of the fact that the buyers *do not have any market power* in terms of antitrust law. Therefore, this tends to form *external protection of group- (interest-) defined justice*.

Factually asymmetric contracts whose internal dynamics is determined primarily by the economic position and economic power of the parties and their access to information will obviously not become *substantively symmetric* simply because of the fact that they will not include certain prohibited stipulations. The weaker supplier may not even ask for business terms and conditions[34] that should form the basis of business negotiation and which should reveal some of the unfair elements; the buyer might actually "incentivise" such behaviour at the expense of those suppliers who insist on the business terms and conditions. Another "incentive" may be agreed for a supplier who tolerates without complaints deviations from the agreed terms and conditions. It is also possible to favour the pliable suppliers and penalise the more resistive ones without being exposed to sanction. The "fear factor" will not be eliminated. After all, where should be the borderline between fierce competition and abusive exploitative use of bargaining position, so far the other party is not ready and willing to leave the market and is still fearing of interruption of the commercial relationship even under hard terms and conditions?

Such a competitive pressure from the opposite market side may by double-edged. It may both reduce sources and cause underinvestment and decline of innovation[35] (and/or quality) and, by contrast, enhance the efforts to innovations and new solutions, as well.

2.5. Flexible and opportunistic content of business "justice"

In the area of private law, "justice" is a matter for the parties in a legal relationship themselves, who do not rely on the State power. This is the *equalising (corrective) justice – iustitia commutativa* – that arises in an interaction of the interests of both parties and can be characterised as an indifferent intersection of their interests and values; it represents a state of affairs which is acceptable to both parties, to their satisfaction.[36] After all, the guiding business (moral?) principle holds true for both parties of a balanced commercial relationship, namely "buy low, sell high".[37] However, such a state of affairs can only be achieved in a situation where both parties are able to express their authentic and undistorted free will, i.e. when they are both in the position of abstract equality. Equalising justice neglects the existence and comprehension of individual differences between the parties.

Precisely because this equality is and can only be abstract and no two entities can ever factually be equal in all respects, a distortion of the private autonomy of will occurs and one

[33] Cf. Section 4 of the SMPA , in fine.
[34] Cf. Annex No. 2 to the SMPA, par. 1.
[35] Nonetheless, empirical evidence is not supportive of this concern. So e.g. UK Competition Commission found in 2008 („The supply of groceries in the UK – Market investigation, 30. April"), that „despite the undoubted strength of the big retail chains, the financial viability of grocery suppliers was not under threat, there was no evidence of decline of investment and innovation, and there were no major barriers to entry and expansion for smaller suppliers". See NIELS, G., JENKINS, H., KAVANAGH, J.: *Economics for Competition Lawyers*, Oxford University Press 2011, p. 167.
[36] Conceiving contractual law as the parties' realm of freedom. Cf. the memorable statement of the liberal thinker Fouillée: he who says "contractual" says "just".
[37] Conf. BUTTÁ, A., PEZZOLI, A., cited work, p. 179.

of the parties must adjust to the interests of its partner more than the other; in the extreme, this takes the shape of a de facto dictate of the stronger party hidden under the veil of a contract.[38] To speak of a contractual freedom in such a situation would be an insult to the notion of "freedom", since it leaves no room for independent decision-making to the weaker party.[39]

In these cases the very notion of justice suffers, which overlaps with other areas than just the clash of interest of the parties – indeed, this affects the social cognisance and generally the shared ethics of what is right and decent. This reveals that in certain situations of imbalance of bargaining power, there are two opposing *private autonomies* – one of the stronger and the other of the (much) weaker party – cancelling each other to a clear advantage of the much stronger party. The principle of *distributive justice then applies*.

While corrective justice is provided for by the parties themselves through their interaction (and it belongs to the domain of private law), distributive justice requires a mediator of external values and interests (and is provided by the State or a government authority authorised by the State).[40] It thus belongs to the domain of public law.

Corrective justice is an expression of internal and current bipolar context of the interests of the partners, whereas distributive justice encompasses broader, externally introduced social criteria of fairness. Unlike corrective justice which does not take account of the specific features of the participant in a legal relationship, distributive justice takes this into consideration. As a matter of fact, it represents an implicit expression of the fact that private parties to a relationship are not able to pursue their own aims, or they do so not in accordance with broader social goals and values, which are imperative. Typically, contractual freedom is suspended with respect to violation of the autonomy of will and freedom of will as a consequence of a considerable power imbalance in the contractual relationship[41] or due to a conflict with superior public interests, which take precedence over the interests of the parties.[42]

Substantive justice in a private-law relationship may be threatened or even excluded due to the merely procedural character of corrective justice following from the formal equality of the parties, which is incapable of attaining substantive justice.[43] This results in a structural change in private law, which is now constitutively connected not only with commutative justice, but also enforces the "public-law" aspects of distributive justice[44] aiming at wealth transfers and other societal goals that are questions of policy.[45]

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[38] For Stammler, the law of the strongest is the utmost lawlessness.

[39] Cf. ZÖLLNER, W.: *Archiv für die civilistische Praxis 1996*, p. 28 ff, cited according to CHEREDNYCHENKO, O.H.: *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, Selier European Law Publishers GmbH, München 2007, p. 284.

[40] According to G. RADBRUCH, (*Rechtsphilosophie*, Section 4) equalising justice is a concept of private law and distributive justice is one of public law, as noted by CHEREDNYCHENKO in the cited work, p. 36.

[41] Cf. protection of employees, children, consumers, anti-discrimination regulation, etc. For example, the constitutive protectionist role of labour law and its prevailingly prohibitive contents based on the outer aspects of justice in the form of employee protection makes it a part of public law rather than of private law.

[42] Cf., for example, the prohibition of certain contractual acts prohibited by criminal law, competition law, tax laws, environmental laws, etc.

[43] Cf. CANARIS, C. W. : Die *Bedeutung der iustitia distributiva, München*, Verlag der Bayerischen Akademie der Wissenschaften, 1997, p. 46 ff; cited according to CHEREDNYCHENKO, p. 44. The traditional private-law individualisation aspect was related to defects in the will of a party (regulation of the consequences of an error, coercion, duress) but there was also expansion towards control of the contents of the contract (cf. Section 49 of the 1964 Civil Code regulating the consequences of contractual relations under markedly unfavourable conditions, although in combination with duress, as a defect of free will).

[44] For more on this, see BEJČEK, J.: *„Privatizace" veřejného a „publicizace" soukromého práva ("Privatisation" of Public Law and "Publicisation" of Private Law)*, in Základné zásady súkromného práva v zjednotenej Európe/Fundamentale Grundsätze in vereinigten Europa (Fundamental Principles of Private Law in United Europe). Bratislava: Iura Edition, 2008. pp. 101-131.

[45] Cf. AYAL, A. Fairness in Antitrust. Hart Publishing, Oxford and Portland 2014, pp. 109, 157 and elsewhere.

The SMPA clearly has such ambitions and the Office as an administrative body is to use it to penetrate into a domain traditionally reserved for court decision-making. The Office is supposed to decide whether the agreed business terms and conditions are unilaterally favourable or not.[46] These and similar external and hardly normatively definable aspects are virtually blanket and the wording of their real contents is *de facto* transferred to case law, as well as to decision-making in administrative proceedings.

However, the Office may not act as a "moral arbiter with legal implications" under the existing regulation without connection to a targeted or current significant *distortion of competition*. The Office's competence as stipulated by law implies that the Office may only deal with[47] existential protection *of competition as a* common property*; it is not authorised to evaluate and make decisions on the fairness of agreed terms and conditions, i.e. to provide a qualitative protection against unfair competition and to protect the individual competitors*.[48] There is a doctrinal agreement on this competence reaffirmed by a number of Office's decisions and court rulings. Pursuant to the law,[49] the Office is a central state administration body set up to support and protect competition against unauthorised restriction, not a public-law aide providing cheaper, faster (for the parties) and evidence-wise easier *assistance to dissatisfied competitors* claiming protection (which is private-law in its substance) against stronger partners.

It is true that the Act on the Competence of the Office for Protection of Competition allows for exercise of additional competence of the Office set forth by special laws,[50] including the SMPA. Nevertheless, the latter Act itself stipulates in its Section 5 the supervisory powers of the Office and declares that the Office's competence is set forth in the Act on the Competence of the Office for Protection of Competition. *Any* change of its substantive competence toward supervision of the fairness of competition thus lacks any legal basis.

Unfair practices or unfair terms and conditions used on the part of the buyer with approx. 10% share of the market can hardly be construed as systematic and existential threat to competition. An interpretation analogy of "cumulative effect of negligible agreements restricting competition" could be considered – i.e. a cumulative effect of sweeping and generally-applied unfair business terms and conditions – but then their effect[51] (not only the aim itself!) would have to be proven, not simply alleged. This would be difficult since sweeping use of essentially similar or the same allegedly unfair business terms and conditions by all significant buyers would, on the contrary, represent an equalisation of the competition circumstances on the supply side, which would comply with free competition.[52]

Other stated impacts on competition in the form of the foreclosure effect, exclusionary effect, spiral effect and waterbed effect and withholding investments are either hypothetical or difficult to quantify and prove in practice; nevertheless, they would have to be demonstrated

[46] Under Section 3 (1) in fine, of the SMPA.
[47] Cf. Section 3 (1) in fine, in conjunction with Section 4 in fine, of the SMPA.
[48] Competition law and in particular the regulation of an abuse of market power should play only a residual role (if any at all) in respect of unfair contractual terms and conditions. Cf. O´DONOGHUE, R., PADILLA, J.: *The Law and Economics of Article 102 TFEU*, 2nd. Ed., Hart Oublishing, Oxford and Portland, Oregon 2013, p. 860.
[49] Cf. Section 1 of Act No. 273/1996 Coll., as amended, on the competence of the Office for Protection of Economic Competition.
[50] Cf. Section 2 of the Act on Competence of the Office for Protection of Competition.
[51] Similar to, for example, the effect of a large number of otherwise individually negligible agreements on exclusive distribution of beer which would have a foreclosure effect on the market.
[52] This, obviously, provided that the almost identical conditions did not occur as a consequence of a prohibited agreement restricting competition.

in order to prove a breach of the law.[53] The SMPA does not include analogous "hard abuses of significant market power", which would be prohibited *per se* similarly to *hard core* cartels, without the need to demonstrate their harmful effects in each individual case.

A "creeping change" in the competence of the Office through the SMPA (created through a Member of Parliament's initiative and without proper and standard legislative review procedure and an explanatory memorandum) would be questionable at the very least; at the same time, this would not represent a reduction, but a factual appropriation of additional competence by a public administrative body. Furthermore, it appears that this trend will continue in the future since the amendment to the SMPA that is being prepared intends to delete without replacement the condition of targeted or actual significant distortion of competition on a relevant market from the general clause of abuse of significant market power.[54] It thus represents not only a deletion of the characteristic of "significance" of the distortion of competition, but giving up on a proof of [55]any *impact on competition whatsoever*. In that case, the Office would become an official (out-of-court) arbitrator of the

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[53] Hauptgutachten 2010/2011, No XIX, Monopolkommission: *Stärkung des Wettbewerbs bei Handel und Dienstleistungen,* Nomos Verlag, Baden – Baden 2012, p. 372 et seq. Really negative (detrimental) impact of buyer power has not been proved yet (ibid, p. 378). W*aterbed effect:* pushing down at one place results in a pop up elsewhere – it is believed that this is how suppliers to chains can make up for their losses in their relation to buyers without a significant market power – producers attempt to make up for the lower margins obtained with large buyers by trying to enforce tougher conditions on smaller business partners. While this is a possible consequence of demand power, it still depends on a number of influences. Similarly as possible reducing of competition in upstream markets as undertakings try to cope with lower margins enforced by the strong buyers without fostering efficiency in production; it may allegedly also lead to increase of concentration of supplier´s markets without improvement of suppliers´ efficiency (conf. BUTTÁ, A., PEZZOLI, A., work cited above, at 162 et seq.). The *foreclosure effect* may result from an individual business seeking to eliminate, entirely or partly, its competitors or a supplier through special delivery terms (such as exclusivity). This is more difficult if the relevant range of products comes from multiple producers providing a substitute source of supplies. *Exclusionary effect* essentially represents an option where suppliers (sellers) apply fighting (predatory) prices. The tactics of predatory offers can also have the exclusionary effect on an upstream market (cf. *OECD Policy Roundtables Monoposony and Buyer Power*, 2008, DAF/COMP (2008), 38, of 17 December 2009, p. 54). *Spiral effect* is a metaphor for a situation where a business with a market power seeks to improve its position towards competitors by obtaining better purchasing conditions than the others. Spiral effect exists if the demand power increases with the supply power on a downstream retail market. This, however, is a controversial strategy which may fail with the entry of more efficient competitors and efficiencies of scale that also improve purchasing conditions. *Distortion (withholding)* may result from producers' low margins. In addition, businesses' own product labels used instead of the producer's brands cut the producer's receipts from innovations. *Withholding investments* and detrimental influence on reduced consumer choice is sometimes declared as a consequence of buyer power (see BUTTÁ, A., PEZZOLI, A. ibid, at 163). Insisting on unjustified lower input costs might first: allegedly weaken the rivals of a strong buyer (in a horizontal level) and reduce their innovations and ability to adapt to changing consumers´needs, and second: lower margins may made suppliers (in horizontal level) to reduce investments and innovations and it may cause reduction of consumer choice and allegedly raising prices. It is nevertheless mere hypothetical development. An opposing scenario may be declared as possible one, as well. Lower margins achieved downstream may force the suppliers to innovate in order to make higher efficiency and to survive in the fierce competition. There is no guarantee that higher margins of the suppliers towards buyers (that would as a rule lead to higher consumer prices) would otherwise have been invested into innovations instead of to be consumed for other needs of the supplier only. An ex-post rationalization (excuse) of an allegedly hurt party may be very opportunistic, biased and flexible. After all, there has not been given yet unambiguous evidence either for the view that market power (and all the more so subdominant "significant" market power) generally "threatens innovation by lowering the return to innovative efforts or for the Schumpeterian view that concentrated markets generally promote innovation..." - cf. GILBERT, R.J. *Competition and Innovation,* ABA Section of Antitrust Law, Issues in Competition Law and Policy (Collins, W.D. ed, 2008) p. 577, 583.

[54] Section 4 of the SMPA.

[55] According to the Explanatory Memorandum on Amendment to the SMPA, par. 1.6, p. 17.

substantive correctness of contractual relationships between parties, although a substantive incorrectness need not necessarily have implications for the existence of competition. In the worst-case scenario, the negative or potential impact could be simply declared as "obvious" and self-evident (if the amendment passes into law), without any need to demonstrate it. Such a solution would hardly be compatible with the principle of legality, let alone consistency with the Constitution.[56]

3. Current SMPA and its planned amendment – an amendment with original problems thereof?

Since the very necessity of the SMPA is a subject of legal and political disputes, a draft amendment was prepared with the ambition to clarify some of the outstanding issues and make the Act into a more useful legal instrument. It appears, however, that a political decision has already been made not to adopt the notion of "economic dependency" as a specific relative relationship determined neither sectorally nor structurally (restricted to suppliers only), nor by absolute turnover values or the relative share on the market. The amendment completely relies on a single notion, i.e. the absolute concept of significant market power determined in a general manner, with no regard to the specific relation between the business partners.[57] The CZK 5 billion turnover threshold[58] remains a supportive, rebuttable assumption; it does not negate Section 3 (2) of the SMPA, which sets forth relation criteria for evaluation of significant market power according to the template for assessing market power under the PCA. In fact, the ambiguous wording of the current SMPA and its draft amendment does not provide any reliable support for this clear shift towards the objective concept and could just as well serve the completely opposite notion (of relative economic dependency).

3.1. Justification of regulation

The very effort to introduce an amendment obviously represents a confirmation of the legal and political opinion that this public-law regulation is, in principle, necessary. Arguments against this form of regulation are strong, but so are the interests behind the opposite opinion, which is currently stronger and more influential. The aim of the amendment is especially to remove ambiguities and the confused nature of the existing regulation. I believe the latter effort will be more successful (if the amendment is passed) – if only because of the removal of annexes which are casuistic and "fertile" in terms of their interpretations. The admitted lack of concept and ambiguity of certain terms could be compensated, if the amendment is adopted, by its formal simplicity and a greater ease of implementation of the Act on the part of the Office; nevertheless, legal certainty and predictability of decision-making and the criteria used in it are not likely to be improved.

The authors of the amendment and the related explanatory memorandum do not allow for any doubt concerning the need for an invasive, mandatory public-law regulation of business relationships, although the bargaining power of retail chains in the Czech Republic is among the lowest in Europe due to their non-existent market power and low market shares.[59]

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[56] An option which I find somewhat eccentric, although it was allegedly contemplated by the Office, was to regard material distortion of competition on a relevant market in the sense of Section 4 of the SMPA as material distortion of fair competition, i.e. a sort of qualitative protection.

[57] An approach supported by Section 3 (2) of the SMPA.

[58] Pursuant to Section 3 (3) of the SMPA.

[59] The US is a telling example. Farmers there obviously also complain about unequal bargaining power in relation to sellers and their helplessness face to face unfair conduct, their having to accept tough business conditions, etc. Nevertheless, the federal Supreme Court concluded that antitrust law should apply only where

The amendment does not move away from the concept of significant market power as a sort of "qualified sub-dominance" and rejects the relative concept of economic dependency of a partner in a specific business relationship. Significant market power is supposed to be understood as an objective and non-individualised position of retail chains on the market.[60] Conversely, the concept of economic dependency, which describes long-term relationships between the individual partners more accurately and flexibly, is not an absolute concept since it relates only to individual economic subjects, its character is long-term and continuous and it creates lasting economic connections between parties.[61]

The rebuttable assumption of significant market power based on turnover (now not only of the buyer) will remain valid. Nonetheless, a non-exhaustive list of the merits in Section 4 of the draft amendment includes only possible violations of the law on the side of the *buyers*.

3.2. The aim of the regulation

The draft amendment aims primarily to improve the legislative-technical standard of the SMPA; it does not address the underlying aim of the original regulation. Interpretative inference, or veiling of the true aim of the regulation, is thus likely to continue. The issues connected to the bargaining power of retail chains are known and solutions are being sought also on the EU level.[62] The context allows to infer that the pursued aim is distributive justice introduced externally into an area where equalising justice does not work in the interaction of the interests of partners in a private-law relationship due to the de facto dictate in the form of a contract.

However, it is questionable whether an administrative body and administrative proceedings are best suited to achieve such balance. Thus far, the aim of "distributive justice dispensed *administratively*" has been concealed under a thin veil of the declared aim of protection of competition. This caused problems, however, since the proof of causality between unfair practices of certain retail chains and a significant distortion of competition on a relevant market, still required by the law, has been difficult to obtain. At least the competitive and confusing smoke screen of redistributive justice is to be removed by the amendment.

Despite the proposed removal of protection against significant distortion of competition from the wording of the Act, the explanatory memorandum[63] still counts with a negative (even merely potential) impact on competition. The explanatory memorandum thus paradoxically *anticipates* that there are merits of administrative offence, which the wording of the Act avoids on purpose and they are *omitted* from it. It is questionable whether the amendment will thus bring any greater clarity concerning what constitutes significant market

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the relevant practice distorts competition on the market as a whole and that even obviously insidious conduct of one to another (i.e. without market power) does not justify an antitrust action. Thus, antitrust law is not a substitute for the laws protecting from unfair competition. Cf. POZEN, S.A.: *Agriculture and Antitrust: Dispatches and Learning from the Workshops on Competition in Agriculture*, Antitrust, Spring 2012, p. 10).

[60] Explanatory Memorandum, p. 14. Unwittingly, the Act is constantly aimed at just one party of the relationship (buyers) and removing the formal limitation of its scope covering exclusively buyers would be more a tactical concession in favour of critics; this would in no way change the fact that the Office will continue to focus on large buyers only.

[61] Cf. FILHO, C. S.: *A Legal Theory of Economic Power (Implications for Social and Economic Development*), E. Elgar Publishing, Cheltenham 2011, p. 86, 155.

[62] Cf., for example, communication "Tackling unfair trading practices (UTPs) in the business-to-business food supply chain", COM (2014) 472.

[63] P. 16 of the Explanatory Memorandum (on Section 4 of the SMPA): "However, any conduct which has, or could have, an *adverse impact on economic competition* on the relevant market may represent abuse of significant market power." (highlighted by the author).

power. It is not at all likely that the *legal uncertainty* concerning the scope of the permissible and prohibited acts will be removed, as the explanatory memorandum suggests.[64]

After the removal of the threat or damage to competition from the general clause on abuse of market power, the already raised complaint that the true aim of protection through the SMPA is individual protection, not institutional protection, will be that much harder to refute. At the same time, selective and discriminatory public-law regulation may paradoxically threaten or distort competition and consumer welfare. At least competition between suppliers through terms and conditions, from which the consumer may benefit in the end, can be effectively prevented by the law.

The aim of the regulation is further obscured by the fact that the SMPA considers itself to be a special regulation in relation to the PCA.[65] This special regulation, however, has a different aim than the basic regulation, which is very unusual – special regulations generally contain the methods and specific ways of achieving the general aims of the implemented regulation. At the same time, the amendment anticipates that any test for prohibited acts or distortion of competition will no longer be mandatory. [66]

The submitters of the draft amendment to the SMPA have further stated that private-law means in the relevant area have failed. However, this is simply an intuitive conclusion unsubstantiated by any analysis of substantive prerequisites of lawmaking. Indeed, no such analysis had been performed prior to the adoption of the SMPA (since at that time, the primary reason for its adoption was that regulation "had been repeatedly requested") and no study or estimate of the social impact of the SMPA is still available.[67]

It was further admitted that the problem of "undesirable practices" could not be solved through competition rules[68] either. As a matter of fact, the existing rules only confirm that competition on the relevant market is not threatened – and cannot be threatened by definition – by these practices, although the law[69] prescribes that for abuse of significant market power to exist, the definition of a threat or damage to competition must be met. Thus-conceived Act has been immensely difficult to apply reasonably.

The SMPA could also be considered a special regulation in relation to the Civil Code, especially with respect to the general protection of the weaker party stipulated by the Code. Pursuant to Section 433 of the Civil Code, "a person who acts as an entrepreneur with respect to other persons in economic transactions may not abuse his expertise or *economic position* to create or *take advantage of the dependence of the weaker party* and to achieve *a clear and unjustified imbalance* in the mutual rights and obligations of the parties." There is probably no difference with respect to "significant imbalance in the mutual rights and obligations of the parties" under Section 4 (2)(a) of the draft amendment to the SMPA; if any difference is found, it was likely unintentional. In case of a simultaneous offence under the SMPA and the

[64] Cf. par. 1.5. of the Explanatory Memorandum, p. 16.

[65] Cf. Regulatory Impact Assessment (RIA) on the amendment to the SMPA, par. 1.3.

[66] (Perhaps) unwittingly it was revealed that demonstrating impacts on competition is to be intentionally abandoned in order to accelerate and simplify administrative proceedings before the Office (par. 1.6. of the Explanatory Memorandum on the SMPA, p. 17). It is striking that this pragmatic "operational aspect" should take preference over the substantive element of the merits of an offence.

[67] It is obviously hardly conceivable that paternalistic public law regulation should be employed whenever private law "fails" in such an indemonstrable and untrustworthy manner or where a party, in the interest of preserving a contractual relationship (which shows that it is interested in the relationship and still regards it as advantageous) fears to address problems by private-law means.

[68] Evidently meaning their public-law branch. The applicability of the rules on protection against unfair competition was "condemned" in a perfunctory way by the above unjustified statement that private law means have failed.

[69] Cf. Section 4 (at the end) of the SMPA.

Civil Code, will the protection of the weaker party have two separate lines, or will they influence each other? While Section 433 of the Civil Code will likely be applied only in extreme cases of imbalance due to the emphasis on the principle of contractual freedom, the administrative body may be of different opinion.[70]

3.3. Can a sub-dominant entity existentially threaten competition?

This category of a sub-dominant undertaking endangering competition implicitly introduced by the SMPA in its current wording would cease to exist after amendment since the abuse of significant market power would not necessarily have to significantly threaten competition.

According to the explanatory memorandum to the SMPA, none of the three largest retail chains reaches a 12% share on the relevant market in retail sales of food and the collective share of the eight largest chains approaches 63%.[71] It is clear that neither of these enterprises has the market power to endanger competition, where the case-law-principle of *special responsibility of the dominant undertaking* would apply. The market of this structure is very competitive, although there is a group of leading, relatively stronger subjects.[72]

After the amendment, there should be a category of *sub-dominant entities* (lacking market power *stricto sensu*) that does not necessarily have to (and could not in the past) impede competition in terms of its existence but that - despite this fact - will carry a "*special public-law-based responsibility"*; not because of the competition environment, but for the "*fairness*" in dealing with partners. The SMPA would thus paradoxically impose requirements (regarding the contents of contractual arrangements) on entities exercising *sub-dominant*, yet "significant", market power that are not required even of *dominant* competitors.

One positive aspect of the draft amendment is the formal removal of the "status-creating" position in the specific relationship (supplier or buyer). The same cannot be said about the selective classification of the field of the "punished" stronger business partner (buyer of agricultural or food products). Outside this field, only the general private-law protection of the weaker party under Section 433 of the Civil Code should perhaps apply.

The stronger buyers cannot automatically be considered harmful to the consumers. They often represent an effective counterweight to the suppliers and may use pressure against them to increase consumer welfare. This is beneficial and acceptable in terms of competition law in case of sub-dominant buyers without market power *stricto sensu*. Any successful negotiation concerning a discount on the price or other business terms means that there is still some room for price reduction or for other concessions on the part of the seller from which the consumer represented by the distributor can benefit.

Not even the "fear factor" allegedly preventing the weaker entities from advocating their rights through private-law protection can be removed through the State or EU paternalism.[73]

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[70] Especially if the apodictic and axiomatic view prevails as expressed by the Office within the commentary procedure on the draft amendment that "public interest" (sic!) in fair conduct prevails over contractual freedom".

[71] Explanatory memorandum on the draft amendment to the SMPA, pp. 11-13.

[72] According to information provided by employees of the Office at the St Martin Conference on 12 November 2014, there are about 18,000 businesses on the Czech food market and the 50th competitor by size has a mere 0.1% share of the relevant market.

[73] The poetically formulated thoughts of Dr. RUDOLF IHERING from 1872 (Struggle for Law, published by the publisher of "Rozhledy", Josef Pelcl, in Prague, 1897) have not lost its ethos to this day: "Defying grievous injustice, which in itself encourages defiance, is an obligation... of the entitled party to himself, an imperative of ethical self-preservation" (p. 28). "... Defending law is also a duty towards society". (p. 48) "In the field of private law, too, there is a struggle between law and lawlessness, a common struggle of the whole nation in which all must stand together firmly; here again, everyone who flees betrays the common cause by strengthening the opponent's cause, increasing his liberty and confidence" (p. 50). Extension of group or representative actions

A true weaker party will not attempt to move against the stronger party and will not opportunistically use the "umbrella" of public-law regulation in order to compete with competitors.[74]

Of course, even in the case of sub-dominant buyer, the pressure on the suppliers may impact consumer welfare negatively – through the *boomerang effect*. The seller may reduce quality in order to avoid losses due to the price reduction enforced by the buyer, since its costs remain the same – the buying power will thus make goods cheaper at the expense of quality (especially in case of non-branded food products). The decay of quality is made easier by private labels (brands) where there is no guarantee of quality assurance similar to the original branded goods.[75] However, these issues are surely better addressed through the supply-demand interaction on the market, potentially under supervision by a special sectoral regulator, than by an intervention of the Office acting in a "quality control" role.[76]

The amendment does not intend to change anything in the above concept of so called significant market power - in terms of market position towards all - included in the current SMPA . Significant market power is to be understood as an "*objective position* on the market" and not as a potential result of evaluation of the *individual relationships* of parties, since

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against unfair business practices could certainly contribute to fulfilment of the "struggle for law", but that is a different story.

[74] So called „fear factor" is usually considered to be relevant for the sellers that are afraid of losing business opportunities with distributors. Sellers used to be allegedly discouraged from insisting on their own contractual requirements and are not seldom made to comply with buyers´ones. The question is, whether sticking to the same buyer does not demonstrate that this is yet the better and still economically satisfying alternative for the seller than to leave the market. If the situation really would develop into an economic dependence, it is subject to a careful individual assessment of a particular case and it can hardly be replaced by a very rough and broad public- law-classification.

Complying the contracts and business terms with private-law requirements in terms of freedom of will, absence of undue influence, duress, etc. may be admittedly only apparent in situations of economic unbalance even under the threshold of market dominance. But it is still up to the weaker party to make its own decision on its own assessment of all pros and cons. It should not be replaced by public-law intervention about what is fair and decent in commercial relations unless workable competition is impeded. The „fear factor" manifested in an unwillingness to enforce someone´s private law rights and interests might be converted into a „fear factor" to pursue someone´s public-law-based surrogates thereof. Those who are fearing of the stronger party and do not enforce their private law rights are expected not to fear of the same counterparties only because of public-law-anchored– possibilities to make so? The stronger party (even though subdominant one) will probably find out some more indirect ways and means how to restore an equiibrium conformable to the real economic conditions existing between the parties and to persuade the weaker party to comply with them even despite public law „threat". The weaker party will likely not be imune to the „fear factor" and will be reluctant to enforce its interests even if protected by public-law means. The same holds for the readiness and willingness of the weaker party to denounce the stronger party to the public authority for an alleged infringement of public law ban of certain conduct.

[75] Increasing importance of private labels both in terms of quality and quantity was repeatedly confirmed as a result of the sector inquiry int the food retail sector issued by the German Antitrust Authority 31. 12. 2014 (available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Sector%20Inquiries/Summary Sector Inquiry food retail sector.pdf? blob=publicationFile&v=3). Surprisingly, even the markets for the procurement of private labels and for the procurement of the branded products were assessed as separate markets (see p.6).

[76] The European Commission published a study on 2 October 2013 on how the possibilities of consumer choice and innovations on the European food market have changed in the past decade. It suggests that on moderately concentrated retail markets (which is typically the case of Czech distributors), greater bargaining power towards suppliers does not lead to a reduced consumer choice and less innovations. Cf. http://europa.eu/rapid/press-release_IP-14-1080_en.htm. It is stated in the study, amongst other things, that bargaining power on the distributors' part need not necessarily have negative impact on competition and consumers. In some European countries, concentration on the demand side is up to three times higher than on the supply side but there are also opposite examples. National antitrust authorities have not demonstrated in their investigations that the criticised business practices of distributors would harm competition or consumers. Cf. ITALIANER, A.: *The Devil is in the Retail*, accessible at http://ec.europa.eu/competition/speeches/text/sp2014_04_en.pdf.

unlawful practices are applied generally. The criticism of this approach and the principal reservations against it also remain unchanged.

Significant market power is thus to mean a buyer's "general buying power" (but not the market power in terms of the PCA) vis-à-vis all its suppliers.[77] However, exercising it does not have to mean a threat or distortion of competition according to the amendment,[78] although the RIA[79] betrays the continuing ambitions of the Office to protect competition in the given sector.

Bargaining power, i.e. also demand power of the retail chains, is understandable and tangible as a relative economic dependency between the parties to a contract.[80] By contrast, the adopted solution of a kind of "*small dominant position*" and the special responsibility of the sub-dominant undertaking is convenient, but controversial in its concept. The notion that there could be multiple dominant competitors on one market is rather bizarre;[81] there may of course be several sub-dominant entities on the market, but then they cannot have market power and thus the special responsibility of the dominant entity should not apply to them.[82]

4. General lesson

It appears that one cannot expect a uniform approach to controversial practices of retail chains within the EU – currently, there tends to be a reliance on voluntary self-regulation through various codes of conduct.[83] This is, of course, not prevented by governmental regulation; on the contrary, setting forth reasonable boundaries of conduct vis-à-vis the weaker partners through such codes of conduct may become an instrument of prevention against State interference aimed at punishing abuse of significant market power. A mixed approach, i.e. a combination of self-regulation and credible and effective enforcement of law on the part of the regulators, would be ideal. However, credibility depends primarily on clear terminology and rules and predictable interpretation that does not change "on the go". The Czech legal regulation and the expected practice of its application are certainly very distant from these standards; an inherently contradictory regulation containing so many fuzzy terms

[77] Cf. p. 15 of the Explanatory Memorandum on the draft amendment to the SMPA .

[78] Because the text of Section 4 in fine of the SMPA is to be omitted.

[79] Regulatory Impact Assessment (RIA) on the SMPA, p. 21.

[80] The German sector inquiry into the food retail sector (cited above, p. 14) states that „even strong manufacturers with high turnover shares in the food retail sector can be faced with strong bargaining power from their customers, if they have even fewer outside options than their customers." As correctly declared, „this needs to be assessed on case-by- case basis", and not in a normative and administrative way.

[81] Collective dominance obviously does not mean several dominant undertakings but rather joint action of separate sub-dominant competitors (businesses) on the market, acting towards other competitors with an impact similar to one that would exist if a dominant undertaking was active on the market.

[82] Some other particular problems occur; e.g. all contracts between the holder of significant market power and its partner have to be in writing. The prohibition concerns something that does not constitute an abuse of significant market power, but merely helps to conceal it and makes obtaining evidence more difficult. Thus, even completely honest contractual arrangements in terms of their content will constitute an administrative offence if they are not made in writing. This cumbersome requirement will give rise to transaction costs for the buyers and sellers, which in fact represent a "price" (paid by them) for the ease of potential investigation. Another issue is the competence of an administrative body to make decisions, for instance, on whether there is *significant imbalance in rights and obligations* of the parties to each individual transaction; from a traditional viewpoint, this should be the domain of court decision-making. The *simultaneity* of resolution of the same case by the Office and by the court, with different results, also cannot be excluded.

[83] Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *"Tackling unfair trading practices in the business-to-business food supply chain*, COM (2014), 472, of 15 July 2014, p. 2.

cannot be "rescued" by interpretation, despite the best efforts on the part of the body applying it.

The tendency to protect the interests of the producers is clear within the European common agricultural policy as a response to the perceived imbalance in the food supply chain. Temporary *loosening of the rules for protection of competition* set forth in Article 101 (1) of the TFEU (prohibition of agreements restricting competition) is even considered with a view to ensuring an appropriate response in situations of serious agricultural market imbalances.[84] The likely increase in co-operation and concentration on the part of the producers could help to steady the sometimes strained relationships between the suppliers and the distributors. However, the crisis in these relationships is rather often being incited and postulated in contradiction with the reality.[85]

Irrespective of certain reservations concerning details, I believe that the shift toward the absolute concept of significant market power was made unavoidable due to the obscured wording of the Act and the wish to enforce it at least to some degree. In doing this, the legislator obviously did not follow any concept whatsoever since the primary purpose was to redistribute the profits, losses and risks to the disadvantage of the large buyers in a situation, where the concentration on the demand side did not require anything like that. The attempts of the officials of the Office to compensate for the lack of concept of the regulation through interpretation is understandable, since "the law has to be upheld, somehow".

The fact that some countries (e.g. the United Kingdom, Lithuania and Hungary) apply the absolute concept of significant market power cannot in itself serve as a justification for its use in the Czech Republic. The same "logic" could be used to argue for the completely opposite viewpoint: the absolute concept of significant market power is not applied in some other countries (e.g. Germany and Greece), which instead use the concept of abuse of relative economic dependency. Surprisingly, this contradictory concept is used there even though this concept, too, is undoubtedly "difficult to apply". This is because interventions on its basis only occur in extreme cases and it does not exclude hard and disciplinary effect of market incentives to strengthen competition on the demand side and consumer welfare.

The form and circumstances of distribution of food products have changed profoundly in the past decades. Whether this is a result of spontaneous interest on the part of the consumers in this type of mass-purchasing in hypermarkets and therefore an irreversible objective consumer behaviour trend, or if the consumer interest has been induced and manipulated by the retail chains, or whether the retail chains forced this form of purchasing on the consumers, is a matter best left to philosophical debate.

The *supply must necessarily adapt* to this new structure of demand and the institutionalised form in which it is met by the retail chains. The structure is completely reversed in comparison to the Communist era and early 1990s when the distributors were the weaker party in relation to the suppliers. The criteria for the content of legal relationships and their "fairness" must change in accordance with the changed circumstances. Suppliers interested in participating in bulk sales with large economies of scale and therefore in secure long-term profits cannot expect to receive the same treatment as in circumstances where the buyer is economically dependent on them.

The imperatives of decent behaviour, good morals, fair business conduct and newly also the protection of the weaker party regardless of its entrepreneurial or consumer status exist in

[84] Cf. the "agricultural exemptions" from the European competition rules after Regulation No. 1308/2013 was adopted; commentaries are provided by BLOCKX, J., VANDERBERGHE, J.: *Rebalancing commercial relations along the food supply chain: the agricultural exemption from EU competition law after regulation 1308/2013*, European Competition Journal, Vol. 10, No 2, August 2014, p. 387 et seq.

[85] The above cited Communication of the Commission of 15 July 2014 observes (on p. 13) that practices between market participants in a food chain are in most cases fair and sustainable for both parties.

Czech law and can be applied. However, such purely *individualised* imperatives cannot be applied without evaluation of the *specific* relationships between specific subjects. The very size of the stronger party, unless the party achieves dominance on the market, or a specific "unfair" stipulation itself without evaluation of its context cannot serve as a criterion for decision-making or even the sole reason for State interference. This is the case of false positives or *over-regulation*, to which the static structural approach – applied in the Czech Republic in the form of the objective concept of significant market power in place of economic dependency – necessarily leads.

I am critical of the efforts to enforce fairness and appropriateness of business terms and conditions between businesses centrally, non-sectorally and on the European level, and moreover – to "administrate" them rather than to judge them. This represents a kind of unnecessary regulation which contrasts with unified approach to unfair trading practices in relation to the consumers, which helps create a unified standard of "consumer law". It would make inconsistent the already existing instruments which functionally and more selectively cover the same thing that the ambitious Green Paper intends to address generally, at the cost of needless restrictive interventions in private contractual autonomy. Not even the "fear factor" allegedly preventing the weaker entities from advocating their rights through private-law protection can be removed through the State or EU paternalism.[86]

In my opinion, the solution does not rest in "dispensing decency and fairness" through administrative proceedings, but in enabling the other party on the market to factually (not only formally) attain a stronger position and thus reduce the factual asymmetry. The rules and business terms and conditions would be set differently in an interaction of such more balanced partners. This can be seen in the approach of the antitrust authorities to concentration on the demand as well as supply side and to exceptions from the prohibition of co-operation agreements among competitors under conditions which do not distort competition and consumer welfare, while eliminating economically unjustified transfers of risks and costs to the weaker party.

Public-law instruments should primarily be used to protect competition and consumer for good reasons. The generally weaker parties (including small businesses) should protect themselves by private-law means. The level of concentration of demand markets sometimes may cause legitimate concerns in terms of protection of working competition. A suitable antitrust treatment may be based on a local geographic relevant market analysis and relative economic dependence,[87] for buyer power might be exercised (sometimes admittedly with negative impact on competition) even by retailers whose general market share is not particularly high and where full-fledged dominance in fragmented retail markets is not necessary.[88]

If the structure of the Czech food market was different (if the concentration was higher), it would obviously be possible to address it through a greater effect of antitrust regulation – e.g. through a fictitious (artificial) narrowing of the relevant market, which would also artificially

[86] The poetically formulated thoughts of Dr. RUDOLF IHERING from 1872 (*Struggle for Law, Der Kampf um's Recht*, published by the publisher of "Rozhledy", Josef Pelcl, in Prague, 1897) have not lost its ethos to this day: "Defying grievous injustice, which in itself encourages defiance, is an obligation... of the entitled party to himself, an imperative of ethical self-preservation" (p. 28). "... Defending law is also a duty towards society". (p. 48) "In the field of private law, too, there is a struggle between law and lawlessness, a common struggle of the whole nation in which all must stand together firmly; here again, everyone who flees betrays the common cause by strengthening the opponent's cause, increasing his liberty and confidence" (p. 50). Extension of group or representative actions against unfair business practices could certainly contribute to fulfilment of the "struggle for law", but that is a different story.

[87] Cf. KËLLEZI, P. work cited above, p. 61ff.
[88] Cf. BUTTÁ, A., PEZZOLI, A., work cited above, p. 6.

increase the distributors' share on it and thus enable the use of rules prohibiting abuse of dominance, including the special responsibility of the dominant entity.

Artificial stipulation of an assumption (or fiction) of dominance with lesser share on the relevant market is also feasible (the implications would be similar).[89] While such experiments would be rather excessive, the SMPA is, in fact, also an experiment – indeed, surprisingly only years after it came into force we are now seeking if and how it could be applied and what we can expect from it, while we keep changing the "rescue interpretations on the go".

Unequal bargaining power may be a serious problem in terms of construing a "fair" contract and it deserves to be coped with by appropriate means. Yet, the politics and law of competition are not instruments to be used in resolving private disputes of vendors and producers or their unfair competition practices unless they reach an intensity endangering the very existence and functioning of competition.

If the buying power does not distort effective competition, it should not be a subject of attention from antimonopoly authorities. The amendment to the SMPA intentionally gives up on the relation of significant market power to competition, which is not to be proven at all. This implicitly suggests that proving the negative relation of significant market power in order to protect competition is not necessary, since it is obvious, similarly as in the case of the "hard core cartels". However, this has never been demonstrated.

There is another possibility: simply to confess, that this is not about protecting competition but rather about fairness in *private* relationships.[90] Then, however, we should admit that the State – acting through the Antitrust Office – exceeds its mandate and "runs somebody else´s farm at somebody else´s costs.[91]

[89] Finland has followed this route; cf. OINONEN, M.: *The new 30% rule: a viable solution to detrimental buyer power in the Finnish grocery retail sector?,* European Competition Journal 2014, vol. 10, Iss. 1, April 2014, pp. 97 – 121. In Finland, however, more than 80% of the turnover on the food market is generated by two large food chains. The somewhat extravagant amendment to their competition law (Act 197/2012) introduced a general rule (although clearly motivated "ad personam") that if any retail food chain exceeds a 30% share of the national market, it is automatically (!) considered to be a dominant undertaking and falls subject to the rules of "special responsibility" of a dominant undertaking under Art. 102 TFEU. On the basis of the concept of economic dependence, German regulation places even sub-dominant undertakings under the regime of dominant undertakings and imposes on them special responsibility under the above-cited Section 20 GWB (without creating the fiction of dominance with respect to the sub-dominant undertaking). In Greece, which prohibits abuse of the condition of economic dependence following the German model, the State Council concluded that a sub-dominant undertaking is permitted to violate the prohibition of abuse of economic dependence, even in the absence of a contractual relationship between the parties. Cf. PANTAZIS, D.: *Anticompetitive practices*, National Reports section, E.C.L.R. 2014, Iss. 6, p. N-45-46.

[90] Supposed that this noble goal does in fact not only disguise an earthbound redistributive aim about the „size of the segment of the cake" among the producers and distributors. „The goals and values of competition enforcement and the hierarchy between them are not set" (so EZRACHI, A. Sponge. The University of Oxford Centre for Competition Law and Policy, Working Paper CCLP (L) 42. p.27. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572028. Therefore an open and fair discussion concenring the goals has to be supported.

[91] Viewed from legal/political and economic points of view because in purely positivist terms it acts legitimately. This may seem parallel to a situation where the Office also tends to protect competitors and consumers rather than competition as such when punishing *exploitative* abuse of dominant position. Why should then the Office not protect selling entrepreneurs against "general exploitation" by sub-dominant buying entrepreneurs? The reason is, for the very least, that the "exploiting" entrepreneur lacks market power and the other party is not forced to tolerate its "exploitation" because it has no other option than to agree to the negotiated non-discriminatory conditions – unlike a relation of dependence with a completely different intensity towards a dominant undertaking or monopolist.