

OFFICE FOR THE PROTECTION OF COMPETITION

INFORMATION BULLETIN 1/2023

SIGNIFICANT MARKET POWER AFTER TRANSPOSITION AMENDMENT

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Foreword



On 1 January 2023, Act No. 359/2022 Coll. came into force and introduced extensive changes to Act No. 395/2009 Coll. on Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof, primarily due to the need to transpose Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

The Directive and its transposition into the Czech legislation have changed the perspective on all the basic pillars of the existing legal framework of food supplier protection: they have modified the definition of the purchasing markets subject to regulation, the concept of special responsibility of the purchaser, as well as the forms of unfair trading practices that can be enforced by the Office for the Protection of Competition through the Significant Market Power Act. From about 12 to 14 supervised entities with significant market power (the largest retail chains), the number of supervised companies has increased to several hundreds, not only from the ranks of retailers, but also from food manufacturers and food brokers. The original 11 types of abuse of significant market power accompanied by a general clause of sorts have been extended to 22 types of absolutely prohibited unfair commercial practices, which have been supplemented by three additional practices which could be permitted under certain conditions.

The regulation of significant market power, which is newly built on the concept of bilateral bargaining power, has become a major factor in the operation of the entire agricultural and food chain to ensure fair trading conditions for its weakest links.

These regulatory changes have come at a time when the entire agri-food sector is experiencing unprecedented increases in input costs, which are reflected in sharp price increases for basically all products. In this context, we welcome the fact that the Office for the Protection of Competition is now empowered to monitor buyer-supplier relationship along the entire vertical chain, i.e. from farm to fork, so to speak.

The purpose of this information bulletin is to provide an explanation of the basic principles underlying the new statutory regulation and to facilitate the understanding of the entities affected by the Czech law.

Petr Mlsna

Chairman of the Office for the Protection of Competition

1. Principles of Regulation of Significant Market Power After the Amendment

With the entry into force of the amendment to the Act on Significant Market Power No. 359/2022 Coll. on 1 January 2023, the Czech legal environment has undergone a fundamental shift in perception of the concept of significant market power and unfair trading practices. Necessity of full transposition of the Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter referred to as “the Directive”) has brought a number of important changes, the effect of which on the position of buyers and suppliers in the agricultural and food supply chain is extremely significant. The Office provides an insight into the amended legislation by presenting the main principles of significant market power as newly defined.

Protection of the Weaker Party

The purpose of the significant market power regulation is primarily to protect the weaker market player from unfair trading practices of the stronger party. For a number of reasons, in the agricultural and food supply chain, the supplier (typically, for example, a primary producer, a marketing cooperative, a food processing company, etc.) is considered to be a weaker party when selling its products to the buyer. Act No 395/2009 Coll., on significant market power and unfair trading practices in the sale of agricultural and food products (hereinafter referred to as “the Act” or “the Significant Market Power Act”) is intended to protect weaker entrepreneurs from the diverse practices of their business partners and can be considered as a certain public superstructure of the private regulation of unfair competition. Even here, the derogation from good practice or fair cooperation in the market is assessed.

The Act is based on the presumption that some entities, due to their bargaining power, have the capacity to achieve such significant concessions from the other party that the cooperation becomes advantageous for only one party. By prohibiting specific unfair practices, the Act cultivates relations between unequal entrepreneurs and minimises practices deviating from the principle of fair trading.

The asymmetry between the parties to the contract is primarily based on the so-called distribution capacity of the buyer, the most important indicator of which is the amount of its turnover. Since establishing a cooperation with a major trading partner implies a significant increase in the supplier's sales, there are buyers with a significant position in the agricultural and food supply chain markets. Due to its higher bargaining power, the stronger party can achieve more favourable contractual terms to the detriment of its weaker party. This is precisely the kind of behaviour that is regulated by the Act.

Farm to Fork

Significant market power regulation covers the entire agricultural and food supply chain from 1 January 2023. Thus, the regulation covers negotiations between a farmer and a grocer, a

grocer and a wholesaler or distributor, as well as the subsequent purchases of so-called retail chains. It is the regulation of business-to-business (B2B) relationships and, where appropriate, of business-to-government entities (B2G). The Act is not intended to protect consumers and their purchases.

The substantive scope of the Act is defined in particular through the definition of the products the trading of which is subject to regulation. These are so-called agricultural and food products, which are defined by the Act as products listed in Annex I to the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"), as well as products not listed in that Annex but processed for use as food with the substances, products or goods listed in that Annex (Section 2(e) of the Act).

Significant Market Power

The significant market power is a regulation of a one-sided nature. This means that only buyers (purchasers) and/or alliances thereof are obliged to refrain from various forms of unfair trading practices in their individual relationships with suppliers. On the contrary, the supplier trading with the buyer is only the beneficiary of public law protection. However, in the agricultural and food supply chain, most operators act both on the supplier side (when selling their products) and on the buyer side (when purchasing feedstock). Therefore, the status of the operator is assessed separately in each bilateral relationship. For example, a producer of gourmet products will be a buyer in one relationship (vis-à-vis a supplier of eggs and vegetables) and thus liable for compliance with the requirements of the Act, and in another relationship (for example, the sale of gourmet products to retail chains) will be a supplier benefiting from legal protection.

At the same time, the liability of a buyer is not blanket but selective. The buyer is liable for its legal obligations if its annual turnover exceeds EUR 2 million (approximately CZK 48 million), but only towards its weaker counterparties (i.e. towards suppliers generating an annual turnover of less than EUR 2 million). This precludes a turnover-weak buyer from fulfilling its legal obligations in relation to a supplier that is much stronger. Suppliers are protected within the individual turnover threshold bands (Article 3(1) and (2) of the Act) up to a turnover of EUR 350 million (approximately CZK 8.4 billion). If their turnover is higher, the Act presumes that they have become so strong that they do not need any protection beyond private law.

It is not the purpose of the Act to protect all suppliers of agricultural and food products. The activation of statutory provisions is preconditioned by the existence of an asymmetric position between the supplier and the buyer, which is to the disadvantage of the supplier and gives rise to the possibility of unfair trading practices being applied by the buyer. The understanding of significant market power is thus currently based on the concept of relative bargaining power arising from an assessment of the positions of the supplier and the buyer in each individual bilateral relationship.

Suppliers with an annual turnover of over EUR 350 million (i.e. approximately CZK 8.4 billion) remain completely without public law protection. Such suppliers already have a professional organisational structure and such well-developed business skills that they can operate in the

market completely autonomously even without any help of the Significant Market Power Act. Indeed, from a constitutional point of view, it is also not proportionate to provide superstructure public law protection to entities that do not really need it because they are uncompromising to be able to negotiate balanced contractual terms on their own.

Honesty of Conduct

The Significant Market Power Act concerns the private relations of entrepreneurs in the trade of agricultural and food products. In these relationships, private law normally gives the entities a considerable degree of autonomy of will as regards the arrangement of their relations. Even in relationships regulated by the Act, the market players can further regulate their relationships as they wish, but there are also certain non-transgressive limits which restrict contractual autonomy. These include, firstly, the requirement for contracts to be in writing and, secondly, the requirement to refrain from all forms of unfair trading practices, which the Act directly specifies in Article 4.

The Significant Market Power Act is based on certain ethical imperatives, the most important of which is honesty or fairness. Even in a business relationship between two professionals, the parties cannot act in a completely unilateral and unscrupulous manner. Honesty therefore constitutes the basic standard of proper behaviour in legal relations, consisting in the obligation to take the legitimate interests of the other parties involved into account. However, determining what is fair and what is not in a particular relationship between a buyer and a supplier is often not easy, as it will always be partly a subjective perception, which may be based both on the values of society and of particular individuals. Honesty can thus be understood, for example, as acting in good faith towards the other party or as acting fairly and honestly. The corrective of fair business behaviour further reflects the context of cooperation between two entrepreneurs (professionals), where business customs in the sector and the established practice of the parties tend to be a stabilising element.

In addition to fairness, the principle of proportionality is also a key aspect for the conduct of the stronger buyer. This relates specifically to the issues of mutual performance and consideration between the parties and thus to a certain balance between the rights and obligations of the particular supplier and the buyer. The principle of proportionality is based on a reasonable choice between very much and very little. It is therefore an attempt of the legislator to emphasize that mutual performance between the parties must at least correspond in principle (in value, scope, quality, etc.) and must not be great disproportionate to each other.

The Significant Market Power Act therefore understands proportionality primarily in an economic sense, thus linked in some way to the private law institute of disproportionate shortening (Article 1793 of the Civil Code). However, in the case of the Act the reason for the supplier's deprivation is not a certain information asymmetry between the parties, but an asymmetry in bargaining power.

2. Special Liability of the Buyer

Legal liability is one of the basic legal institutes, which is not necessarily related to the general understanding of the word liability. Legal liability determines who and under what conditions is obliged to accept damage to its rights as a consequence of its conduct or condition contrary to the legally protected interests. In each field of law, the conditions of legal liability are set out rather differently, depending on the focus of the respective fields and the issues regulated by them. In the case of the Significant Market Power Act, legal liability is considerably selective, being linked to the fulfilment of several specific assumptions. It is a sectoral liability of the buyer (purchaser), which is set above the general legal liability, and is therefore sometimes referred to as a "special" one.

Special liability under the Significant Market Power Act is characterised by the fact that such a liability can only be acquired by entities that meet certain specific criteria set out in the Act for incurring liability. These include in particular the following:

1. The liable party is a buyer of agricultural and food products and/or alliances thereof (Article 2 of the Act) and is not a consumer. The conduct of the buyer (alliance) concerns the purchase or sale of those products and/or the receipt or provision of associated services.
2. The acquisition of liability towards the other party to the contract is based on the turnover criterion. The buyer's annual turnover exceeds one of the established turnover thresholds and at the same time the turnover of its supplier falls within the lower turnover threshold band (Article 3 of the Act).

Substantive and Local Scope of the Act

The Significant Market Power Act addresses the agricultural and food supply chain (the so-called farm-to-fork principle). The regulation thus applies primarily to the sale and purchase of agricultural and food products and the provision of services related to such purchase or sale. The Act defines agricultural and food products in Article 2(e), which provides that agricultural and food products are (i) products specified in Annex I to the TFEU, or (ii) products not specified in that Annex but intended for use as food and, at the same time, one of the ingredients of the product is a substance defined in the Annex. The scope of the Act therefore covers trade in feedstock as well as in intermediate and final products.

In terms of local scope, the Act applies the so-called theory of effects. It covers trade practices regardless of where they were implemented, as long as their effects have occurred or may occur within the territory of the Czech Republic. This will commonly apply in relations between a Czech supplier and a Czech buyer, but also in relations where only one party has a specific link to the domestic market. However, the Act will also apply if two foreign companies negotiate trade with the above-mentioned products if such an agreement has (even potentially) an impact on the territory of the Czech Republic.

Categories of Buyers Who May Acquire Special Liability

Only certain entities can acquire special liability under the Significant Market Power Act. The significant market power regulation is unilateral, as legal liability only applies to the demand side of the market (buyers). At the same time, it should be noted that the special liability only applies to B2B and possibly B2G relationships and is therefore not applicable in the business-to-consumer (B2C) relationship. The list below provides a basic overview of the entities that can be considered as buyers under the law.

1. Buyer as a Natural Person-Entrepreneur or Legal Entity

The category of a buyer that is most likely to be encountered is the buyer in the form of natural person-entrepreneur or legal entity that purchases agricultural or food products or receives or provides associated services (e.g. marketing services, accounting services, etc.). While the position of the buyer as purchaser of the products in question does not seem to require extensive comment, it is interesting to note that, in theory, a service company may also be in the position of a buyer with significant market power. However, this applies provided that its services are somehow associated with the purchase or sale of agricultural or food products.

2. Buyers' Alliance¹

The term buyer may also include a group of entities referred to by law as a buyers' alliance (or synonymously as a purchasing alliance). This is a concentration of individual buyers, whether formal or informal (de facto cooperation between buyers without a contractual basis is sufficient), who form the group, usually with the aim of increasing their bargaining power vis-à-vis the supplier, so that they can achieve more favourable trading conditions. However, an alliance can take very different forms, it can be a horizontal one (a plurality of buyers), a vertical one (a buyer and an intermediary) or even an alliance between a buyer and a provider of associated services. Thus, the characteristics of a buyers' alliance are (i) a plurality of buyers and (ii) the existence of cooperation between buyers aimed at harmonising practices in the purchase of agricultural and food products.

3. Indirect Purchase Through an Intermediary

In view of the tendency towards evasion of the law by so-called intermediaries (entities who themselves are not formally covered by the scope of the Act), the regulation considers such intermediaries to be the buyers. These are entities that purchase goods from suppliers on the basis of a contract for another buyer (an entity covered by the scope of the Act. This concept was included in the Act to ensure compliance with the Act even in the case of so-called indirect purchases, where intermediaries made purchases of agricultural or food products for another company on the basis of a contract, whereas the regulation contained in the Significant Market Power Act typically did not apply to the supplier's relationship with the intermediary.

¹ Buyers' alliance is dealt with in a separate chapter of the information sheet (pp. 12-18).

Subsequently, the intermediary resold the products to a de facto buyer under the Act, which allowed the final buyer to obtain the products on terms not fully compliant with the Significant Market Power Act.

4. Legal Entity Governed by Public Law as a Buyer

The Significant Market Power Act also considers legal entities governed by public law (e.g. schools, hospitals, etc.) to be buyers, as these entities may also purchase large quantities of agricultural and food products. In addition to the state, municipalities and regions, the regulation mainly affects contributory organisations established by decision of the aforementioned public entities, which operate autonomously (in their own name and on their own account). Provided that such entities fulfil all the requirements laid down in the Act, it will also be possible to speak about the creation of special liability in the case of such entities, involving certain obligations beyond the scope of private law, in particular the written form and content of contracts and the prohibition of unfair trading practices referred to in Article 4 of the Act.

Special Liability Turnover Criterion

To be able to address special liability of a buyer towards a particular supplier, the buyer has to overcome a certain turnover threshold which, on the contrary, is not exceeded by the supplier. The amount of the annual turnover of the buyer and the supplier is assessed in each accounting period according to the thresholds laid down in Article 3 of the Act. Should the buyer exceed any of the turnover thresholds set out in the Act and, at the same time, the supplier with whom it trades is in one of the lower turnover threshold bands in terms of its annual turnover, the buyer will have significant market power vis-à-vis that supplier. The turnover threshold bands to assess the buyer's special liability are shown in Table 1.

Table 1 Special Liability Turnover Bands of the Buyer Pursuant to Article 3(1) of the Act

A buyer with annual turnover of	to a supplier with annual turnover of
more than EUR 2 million	less than EUR 2 million
more than EUR 10 million	more than EUR 2 million, but less than EUR 10 million
more than EUR 50 million	more than EUR 10 million, but less than EUR 50 million
more than EUR 150 million	more than EUR 50 million, but less than EUR 150 million
more than EUR 350 million	more than EUR 150 million, but less than EUR 350 million

The turnover is assessed as a whole, there are no deductions for the part of the turnover for goods that are not covered by the Act. For the purpose of currency conversion, the foreign exchange market rate announced by the Czech National Bank valid on the last day of the

accounting period to which the annual turnover relates shall be used (see Article 3a of the Act for details). According to the above table, a buyer with an annual turnover exceeding EUR 2 million (i.e. approximately CZK 48 million) is liable for the fulfilment of its obligations pursuant to the Act towards all the suppliers who do not exceed the same turnover threshold. Similarly, a buyer with an annual turnover of more than EUR 350 million (approximately CZK 8.4 billion) has significant market power vis-à-vis all suppliers with an annual turnover of less than EUR 350 million.

In addition to the five turnover threshold bands mentioned above, the Act contains a specific threshold of buyer's turnover of CZK 5 billion. Pursuant to Article 3(2) of the Act, a significant market power is held by a buyer (or buyers' alliance) that has an annual turnover exceeding CZK 5 billion within the territory of the Czech Republic. However, this paragraph must be interpreted in the context of paragraph 1 and, above all, the intention and purpose of the whole regulation, which is to ensure the protection of the weaker party to the contract, has to be taken into account. Therefore, it will still be necessary for a buyer with a national turnover exceeding CZK 5 billion to compare its turnover with its contractual counterparty, i.e. with each of its suppliers. Such an interpretation respects the mutual evaluation of the bargaining power of the parties to the contract and, at the same time, actually protects only the weaker party.

Should the buyer meet the above terms of the Act, it shall be considered as an entity with a special liability. Its liability also has a tort aspect: such a buyer (or alliance) is liable for offences under the Significant Market Power Act, in particular for the commitment of unfair trading practices pursuant to Article 4 of the Act.

The definition of agricultural and food products is so broad that it includes both feedstock and a significant number of final products. It will therefore be usual that the same entity may be both a buyer (potential offender) and a supplier (potential victim) in different bilateral relationships within the agricultural and food products supply chain).

Example of Dual Status of the Entity

As an example of the dual position of a number of entities in the food vertical chain, the buyer-supplier relationships in the dairy marketing chain can be considered (see Figure 1). The yoghurt producer (turnover of EUR 12 million) has significant market power on the basis of the turnover criterion vis-à-vis the milk supplier (turnover of EUR 1 million) and is therefore obliged to comply with all the requirements of the Significant Market Power Act in this relationship. However, the same yoghurt producer is also in the position of a yoghurt supplier vis-à-vis a retail chain (turnover of EUR 150 million). The yoghurt producer on the other hand is granted a public law protection under the Significant Market Power Act against this retail chain, and it is the retail chain that is legally obliged in this bilateral relationship.

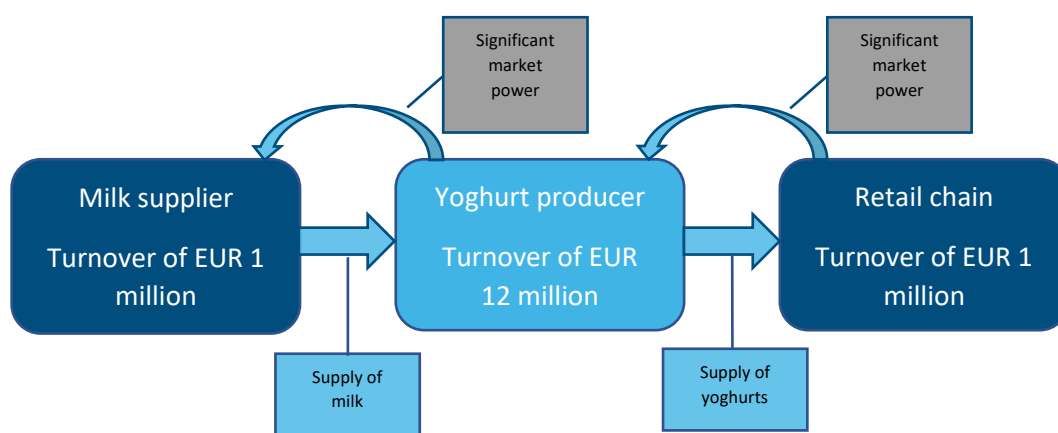


Figure 1 Buyer-Supplier Relationships in the Retail Chain

Role of the Intermediary and Indirect Purchases

Some entities may have a very specific position in the agricultural and food products supply chain. At first glance, they look quite different from their true nature. Such a specific position can be attributed primarily to a so-called intermediary, which, according to Article 2(b) of the Significant Market Power Act, is an entity that purchases agricultural and food products or associated services for another buyer on the basis of a contract. Typically, this will be a contract of mandate, but it may also be other types of contract or an innominate contract.

The intermediary is most often an entity that is authorised by the "final" buyer to purchase agricultural and food products in its own name and on its own account and then resell them to the final buyer. The intermediary's annual turnover itself does not have to exceed the individual turnover thresholds pursuant to Article 3 of the Significant Market Power Act, and it may therefore appear from an external perspective that the intermediary, despite its status as a buyer, does not have to comply with the Act at all in relation to a considerable number of suppliers (or even all suppliers).

There is, however, an obvious form of cooperation between the intermediary and the final buyer in the purchase of goods, the aim of which is, however, not to increase the bargaining power of the buyer, but rather to reduce it to such a level that the intermediary's apparently autonomous purchases are not subject to the law. In order to prevent such circumventing of the law, it will generally apply in this situation (depending on the facts, of course) that the intermediary will form a buyers' alliance with the final buyer, so that their turnovers will be aggregated for the purpose of assessing significant market power.

Thus, although it may appear (e.g. from the text of contracts, position in the supply chain, etc.) that the intermediary is a "mere" supplier of the final buyer, it is in fact a so-called vertical buyers' alliance (described in more detail in another chapter).

B2G Relationships

Although the vast majority of asymmetric relationships subject to the Significant Market Power Act will belong to the category of business-to-business (B2B) relationships, it should not be forgotten that the Act also considers legal entities governed by public law (and possibly also their associations) as buyers, but of course only in situations where they purchase agricultural and food products. Typically, the relationship between a university catering facility and its food suppliers.

Article 3(1)(f) of the Significant Market Power Act provides a separate turnover threshold band for so-called B2G relationships. The specificity of this band is that, in the case of legal entities governed by public law, there is no statutory turnover threshold from which the entities in question have special liability towards their weaker parties. Thus, all legal entities governed by public law, regardless of their turnover, are liable to suppliers with an annual turnover of less than EUR 350 million for compliance with the statutory requirements. In these relationships, the buyer also has to satisfy the requirement of written form and particulars of contracts, and there is also an obligation to avoid all forms of unfair trading practices.

3. Alliance as a Special Form of Entity

The amended Significant Market Power Act defines the legal **concepts of buyer, supplier, buyers' alliance and suppliers' alliance** in Article 2. **In this chapter we will address some aspects of the alliances issue.**

Suppliers' and Buyers' Alliances

The focus of the alliance and the extent and intensity of cooperation between its members often determine the type and form of the suppliers' or buyers' alliance. Primarily, agricultural primary producers establish **processing** or **marketing cooperatives**. Buyers are generally organised in alliances with legal personality which focus their activities on the purchase of agricultural and food products (hereinafter referred to as "the goods") and the receipt or provision of associated services.

When defining the concept of "**buyer**", Article 2(2) and (3) of the Directive states that it "*may include a group of natural and legal entities*"; similarly, when defining the concept of "**supplier**", it assumes that it "*may include a group of agricultural producers or a group of natural and legal entities such as producer organisations, organisations of suppliers and associations of such organisations*".

For the "cooperating suppliers and buyers" referred to in the Directive, the Significant Market Power Act has chosen the concepts of "buyers' alliance" and "suppliers' alliance"; pursuant to Article 2(c) and d):

c) suppliers' alliance shall mean a group of entities established under a contract, another legal act or another legal fact, engaging in cooperation between the suppliers in relation to the production or sale of agricultural or food products or receipt or provision of associated services, or a group of entities established for the purpose of such cooperation, regardless of whether this group is with or without a legal personality;

d) buyers' alliance shall mean a group of entities established under a contract, another legal act or another legal fact, engaging in cooperation between the buyers in relation to the purchase of agricultural or food products or receipt or provision of associated services, or a group of entities established for the purpose of such cooperation, regardless of whether this group is with or without a legal personality.

In its definition of an alliance, the Act on Significant Market Power does not require it to be formed exclusively by buyers or suppliers, but it can be assumed that this will generally be the case. This conclusion is also consistent with the provision on the assessment of the market power of an alliance, which is primarily based on the *aggregation of turnovers of all members of the alliance*.² However, the Office does not exclude that the members of an alliance may also be entities that do not meet the definition of the supplier or buyer. It is also worth noting that the members of the alliance are mainly suppliers or buyers which, according to their

² Cf. Article 3a(4) of the Significant Market Power Act.

structure, correspond to an autonomous, linked or partner enterprise. At least two enterprises can already form an alliance. In general, it can also be assumed that, in the case of a group of enterprises, **both the Directive and the Act foresee the inclusion of cooperative structures** on both the supplier and the buyer side (they must meet the requirement of at least three members).

If the members of an alliance of suppliers or buyers consolidate their business activities, then, even without the existence of ownership relations, they form an "economic unit" which has more significant market power than an individual enterprise (member of the alliance) would have as a single entity.

As already mentioned, the **term "buyers' alliance"** replaces the term "purchasing alliance",³ which has been used in the same context in the text of the Significant Market Power Act in force until the end of 2022. The terms "alliance", "purchasing alliance" or "group of buyers" evoke the idea of the basic objective of such a group (**group of enterprises**)⁴, i.e. the joint purchase of goods; in the Anglo-American and German literature, such associations are referred to, for example, as *marketing & buying groups*, *cooperatives*, *cooperative groups*, *Verbundgruppen*, *Einkaufsallianzen*, *Einkaufskooperativen* etc. It should be noted that buyers' alliances (purchasing alliances, cooperatives), as opposed to suppliers' alliances (producers' alliances), are considered in the academic literature to be less socially dangerous, i.e. less threatening to consumer welfare,⁵ because of the potential benefits in the form of lower prices for consumers.

A group of enterprises (alliance) has several basic characteristics, (i) it involves legally autonomous enterprises, (ii) the purpose is cooperation between enterprises, (iii) the cooperation is multilateral and diverse, (iv) the unifying element is the headquarters of the group of enterprises, (v) the usual legal form of the group's headquarters is a cooperative, a limited liability company or a joint stock company, (vi) they act as purchasing associations in the retail and wholesale sector, in the craft sector, in the service sector and as voluntary supply chains.

In its previous decisions in the context of "*purchasing alliances*", the Office has deduced the following features: (i) the members of the group shall be buyers pursuant to the Act, (ii) the group is established under a contract or another legal act or legal fact, (iii) the existence of

³ See the introduction to the commentary to Article 2(d) of the explanatory memorandum to the amendment to the Significant Market Power Act (Parliamentary Print 174 - IX. electoral period from 2021).

⁴ The academic literature often quotes the well-established definition of the Committee for Definitions on Trade and Distribution of the Federal Ministry of Economics (Germany): "Group of enterprises" is a collective term for an association of legally autonomous enterprises for the purpose of inter-enterprise cooperation. The cooperation may take place in the fields of purchasing, sales, investment, finance and administration. Supporting entities are the headquarters of the group, usually in the legal form of a cooperative, limited liability company or joint stock company. Group of enterprises can include wholesale and retail buyers' associations, trade and service associations and voluntary supply chains. Cf. for example in SCHLESINGER K., *Verbundgruppen: Ihre historische Entwicklung und aktuelle Kategorisierung*, Arbeitspapiere des Instituts für Genossenschaftswesen der Westfälischen Wilhelms-Universität Münster, No. 144, 2014.

⁵ Cf. for example Bundeskartellamt: "Sektorenuntersuchung Lebensmitteleinzelhandel", 2014, p. 326, available at: https://www.bundeskartellamt.de/Sektoruntersuchung_LEH.pdf?__blob=publicationFile&v=7 as well as "The competitive effects of buyer groups" - Economic Discussion Paper, 2007, pp. 105–106, available at: <https://www.rbbecon.com/downloads/2012/12/oft863.pdf>

cooperation between the members in relation to the purchase of food products for resale or the receipt or provision of associated services.⁶

In describing the possible forms of cooperation between suppliers, processors or primary producers, the Directive includes in the definition a wider range of possibilities in the case of suppliers, which, if the text is interpreted more extensively, could possibly mean the inclusion of various professional associations, etc.

Below we briefly introduce the basic forms of alliances. Associations and cooperation between autonomous enterprises can take place at the same market level - horizontal alliances, or as cooperation between enterprises and enterprises in upstream or downstream markets - vertical alliances. It should be noted that, for the time being, we have not yet encountered a type of so-called diagonal cooperation - different sectors and different market levels of the members of the cooperative (in theory, for example, it could be a cooperation between a producer of self-serve stainless steel chilled tanks, a wine cooperative and a retail supply chain).

Horizontal Alliance

For the purposes of the Significant Market Power Act, suppliers' or buyers' alliances shall primarily be based on the horizontal level of cooperation, which in the case of the enterprises involved in the alliance represents an increase in value added for the members of the alliance in the same market. The main purpose of the formation of horizontal suppliers' or buyers' alliances, irrespective of their legal form, is undoubtedly to strengthen the bargaining power of the members of the alliances by means of central bargaining on commercial terms.

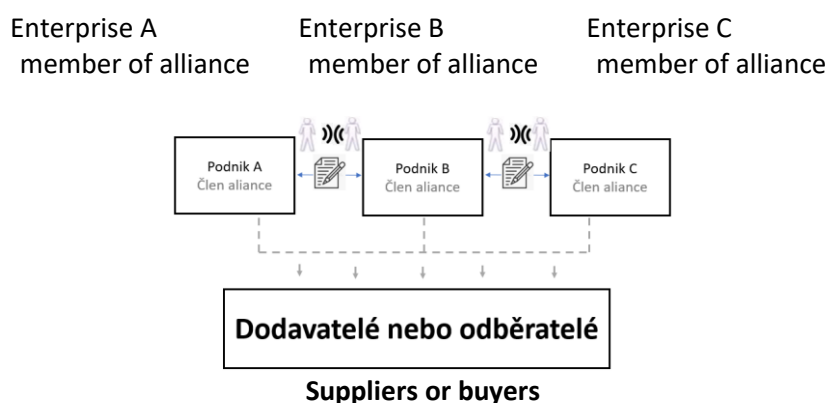


Figure 2 Horizontal Alliance

Vertical Alliance

Suppliers and buyers operating in the same market and at the same time at downstream levels of the production-processing and distribution chain may form vertical alliances by (i) showing a long-standing and consistent preference for the same party in their buyer-supplier relationships and/or (ii) being dependent on each other's transactions (one of the objectives of the Directive is, for example, to protect primary producers - usually members of a marketing

⁶ Cf. the decision of the Chairman, File No. ÚOHS-R103/2022/TS, Ref. No. ÚOHS-44407/2021/164/TFr.

cooperative - from the practices of their own service organisation, in particular in relation to payment terms). This group of entities, irrespective of the specific form of cooperation (whether by virtue of the existence of a legal entity or as a result of formal or informal relationships), acts in concert, for example, by bargaining on business conditions relating to the development, production and supply of private brand products in a certain quantity (volume) and quality to retail chains.

The main reasons for membership in vertical alliances are in particular: (i) cooperation in design, production and marketing of a certain type of product, e.g. a private brand (provision of goods and/or services in a certain volume and quality); (ii) securing stable and long-term buyer-supplier relationships.

Buyers' alliances can be established at any stage of the agricultural and food products supply chain.

The basic model of a buyers' alliance (purchasing alliance) is considered to be a group of autonomous enterprises that have established a common headquarters as their service enterprise. It is the establishment of a "downstream" headquarters, especially from the last level of the flow of goods before sale to the final consumer. Thus, by their very nature, buyers' alliances should only represent cooperation at the horizontal level - in particular, these should be autonomous enterprises holding an equity stake in a common headquarters. Vertical cooperation is cooperation between the buyer and the supplier and therefore rather a classic *buyer-supplier* relationship.

The establishment of cooperation in purchasing according to this initial model represents a strategic means to maintain at least a basic level of competitiveness and profitability of the enterprise at the last level of the supply chain, i.e. at the level of retail sales to the final consumer. Last but not least, for autonomous retail businesses, it is also about ensuring access to assortment of suppliers with bargaining power.

Here it should be noted that for a meaningful functioning of the buyers' alliance (these are legally autonomous enterprises) it is not only advisable but almost necessary to create a central or management structure (see above), which will ensure, for example, the framework conditions for joint purchasing - agreeing the purchase conditions, i.e. agreeing the basic framework contracts and providing other services, such as the concept and production of promotional leaflets, uniform market presentation (visualisation of the business premises), etc.

However, the basic form of a buyers' alliance is hardly encountered in the retail environment of the Czech Republic. Buyers' alliances mainly have a two-level structure. One level consists of horizontal wholesale alliances, while the next level of alliances is represented by so-called retail alliances, i.e. the level of sales to the final consumer. This is thus a vertical link, although under "one banner". The retail level is supplied by these wholesalers and their economic relationship can be considered as a normal buyer-supplier relationship. The retail level of the alliance was thus created primarily as an initiative of the wholesale structures in order to ensure their own sales.

An example of a two-level horizontal alliance structure in conjunction with a vertical buyer-supplier relationship can be, for example, a group of enterprises (wholesalers) with the legal form of a joint stock company, which is a so-called service company (negotiating central framework purchase contracts, managing payments to suppliers, etc.). Furthermore, the service company may, for example, be the sole shareholder of the service company for member entities in the retail sector, i.e. at the horizontal level of sales to consumers (this may provide, for example, a uniform promotional leaflet, a uniform visual appearance of stores, competitions for final consumers, the possibility of central purchasing of services, etc.). For example, a model can also be identified in the market in which part of the horizontal retail entities is a shareholder and most of the other retailers in the network are affiliated by contract (e.g. franchise agreement). The service company mainly provides marketing activities and the alliance does not operate its own central warehouse but uses the services of a contractual supplier (wholesaler).

In order to determine a buyers' **alliance's turnover** for the purpose of classification under one of the turnover threshold bands of the Significant Market Power Act, it may be appropriate to take into account the manner in which goods are supplied at the horizontal level of the market for sales to consumers, as well as the structure of the entities entitled, for example, under the framework contracts concluded by the alliance's service company.

Determination of the Turnover Criterion and the Entities to Be Subject to Administrative Sanctions in Case of Buyers' Alliances

In case of buyers' alliances, the horizontal level of cooperation can be used as the primary basis, which in case of the enterprises (entities) involved represents an increase in added value at the same market level. To determine the turnover of buyers' alliances and entities eligible for administrative sanctions, it is also necessary to take into account the possible flow of goods at the horizontal level of retail sales to consumers (see logistics chain).

The relevant horizontal market level for any assessment of market power in the case of buyers' alliances (purchasing alliances, cooperation) in the agricultural and food products purchase market within the Czech retail environment will be, as already indicated, **primarily the level of cooperating wholesalers**, including the controlled service company. **Such a level of the market is the gateway for goods** (the wholesale level of the market is the so-called "gatekeeper") which are then sold to consumers at the retail level.

It can be seen from the above assumption that in the case of a two-level horizontal structure of the alliance and deliveries of goods by suppliers to the warehouse of the headquarters (service company) or the warehouses of individual shareholders, the entity eligible for administrative sanctions may be the headquarters, a group of enterprises of the same horizontal level of the market (here specifically the headquarters of the wholesales alliance) and also its individual shareholders, partners or members of the cooperative, etc., who apply the terms and conditions agreed in the central framework contracts with suppliers by means of the downstream purchase contracts.

The Significant Market Power Act explicitly provides that a group of enterprises may also be without legal personality (see, for example, a company pursuant to Article 2716-2746 of the Civil Code). In this context, it should be noted that entities that are not even shareholders, partners or members of a legal entity may be beneficiaries of contracts with suppliers for the supply of goods. This brings up a similarity with unincorporated entities, such as an "association of entrepreneurs" or a "consortium", under the already repealed legislation. In a buyer-supplier relationship, such a non-incorporated grouping enables the supply of goods to several buyers (entitled by contract) at the same horizontal market level. On the basis of such a contract, deliveries to the next lower vertical level are also possible, but the benefits initially arising from the quantity would likely be negligible with increasing logistical demands. In this context, and assuming that the contract contains disputed provisions in terms of the Significant Market Power Act, the potential entities that can be subject to administrative sanctions are all enterprises that may be beneficiaries of such a contract and, for the purposes of the turnover criterion pursuant to Article 3 of the Act, the turnovers of the entities entitled by the contract would be aggregated.

On the contrary, with regard to transparency, a concentration of purchases to a single buyer (the sole beneficiary of the contract) and subsequent sales (resales) at an identical business surcharge to enterprises at the same horizontal market level cannot be considered as an alliance without legal personality. For such a situation, it may be preferable to consider it as a common buyer-supplier relationship. However, the specific facts of the case will always be decisive for identifying an alliance.

The situation is different in the case of a two-level horizontal alliance structure in conjunction with a vertical buyer-supplier relationship between the wholesalers and the retail level, where the group headquarters also arranges direct supply of goods to the retail level as a part of its contracts with suppliers (see direct deliveries). In this case, the turnover of the retail members of the alliance must be included in the turnover of the alliance and the members of retail network also become eligible for administrative sanctions (they benefit directly from any unfair practice).

Alliance Member as a Single Buyer

The assessment of an **individual contractual relationship between a single member of the buyers' alliance and the supplier** remains an open issue; **this is not a direct delivery under a framework contract with the alliance's service organisation.**

This contractual relationship can be defined as a contractual relationship that is used only by a specific member of the alliance. Assuming this, it is a common buyer-supplier relationship. In this case, it is not meaningful to take into account the turnover of the alliance for the assessment of the buyer and its classification within the turnover threshold band, and only the turnover of that specific member (including, of course, linked and partner enterprises) can be considered.

In this context, a situation may arise where a majority of the suppliers' product range will be distributed to individual members under a central contract arranged by the alliance service organisation through a central warehouse or warehouses of wholesalers, and direct deliveries

under an individual contractual relationship between the supplier and a member of the alliance will, for example, cover only the part of the supplier's product range in which that member of the alliance is specialised. In such a case, it will be necessary to assess, inter alia, whether the turnovers relating to these direct deliveries are, for example, included in the target amounts for meeting the conditions for entitlement to the payment of a turnover/quantity bonus for the volumes of the entire buyers' alliance.

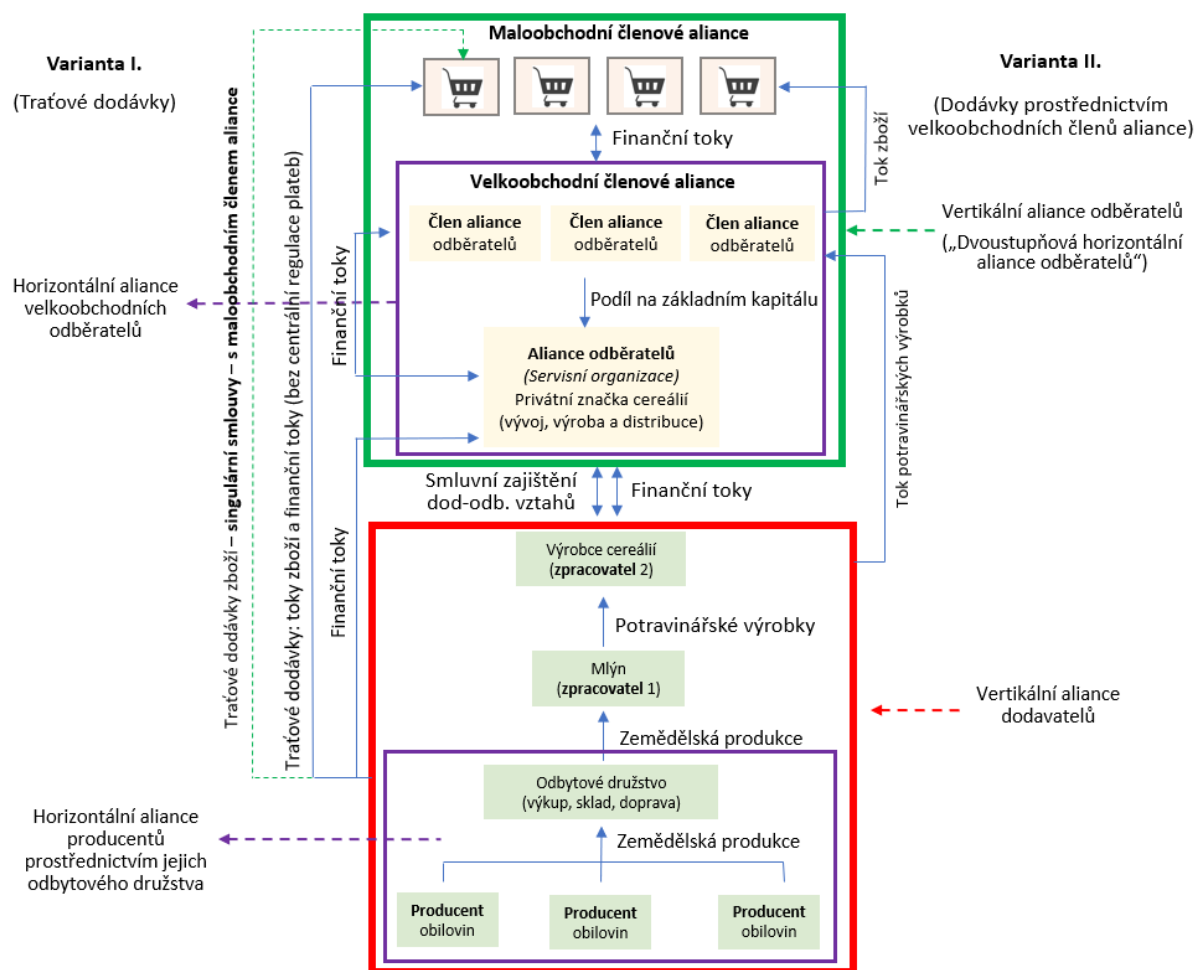


Figure 3 Vertical and Horizontal Alliances, Their Combinations and Trade Relations

Figure 3 – Explanatory Notes

- Varianta I. (traťové dodávky): Alternative I. (direct deliveries)
- Horizontální aliance velkoobchodních odběratelů: Horizontal alliance of wholesale buyers
- Horizontální aliance producentů prostřednictvím jejich odbytového družstva: Horizontal alliance of producers through their marketing cooperative
- Traťové dodávky zboží – singulární smlouvy – s maloobchodním členem aliance: Direct deliveries of goods – individual contracts – with a retail alliance member
- Finanční toky: Financial flows
- Maloobchodní členové aliance: Retail alliance members

- Finanční toky: Financial flows
- Velkoobchodní členové aliance: Wholesale alliance members
- Člen aliance odběratelů: Member of the buyers' alliance
- Podíl na základním kapitálu: Share in the capital stock
- Aliance odběratelů (servisní organizace): Buyers' alliance (service organisation)
- Privátní značka cereálií (vývoj, výroba a distribuce): Cereals private brand (development, production and distribution)
- Smluvní zajištění dod.-odb. vztahů: Contractual arrangements for buyer-supplier relationship
- Výrobce cereálií (zpracovatel 2): Cereals producer (processor 2)
- Potravinářské výrobky: Food products
- Mlýn (zpracovatel 1): Mill (processor 1)
- Zemědělská produkce: Agricultural products
- Odbytové družstvo (výkup, sklad, doprava): Sales cooperative (purchase, storage, transport)
- Zemědělská produkce: Agricultural products
- Producent obilovin: Grain producer
- Varianta II. (dodávky prostřednictvím velkoobchodních členů aliance): Alternative II. (deliveries through wholesale alliance members)
- Tok zboží: Goods flow
- Vertikální aliance odběratelů (dvoustupňová horizontální aliance odběratelů): Vertical buyers' alliance (two-level horizontal buyers' alliance)
- Tok potravinářských výrobků: Food products flow
- Vertikální aliance dodavatelů: Vertical suppliers' alliance

Multinational Buyers' Alliance

To complete the information on the different possible forms and levels of alliances, alliances providing so-called "**on-top agreements**" due to their high cumulative turnover (in some cases even more than 100 billion euros) might be briefly mentioned.

In the agricultural and food products market, there are buyers' alliances specialised in the bargaining of discounts, bonuses and, above all, in the organisation of tenders for the consolidation of private brand volumes for alliance members at international level, i.e. purchasing alliances bringing together entities from several countries. It is typically an „**alliance of alliances**“.

These alliances are not aimed at adjusting the trading conditions of individual national members, i.e. bringing them to the same level, but at the so-called "on-top bonuses" beyond the framework of individual agreements on trading conditions of each member. Buyers' alliances focused on the "on-top agreements" thus usually do not substitute negotiations of individual alliance members on national food supply terms and conditions or, where appropriate, their consolidation. They primarily bargain on behalf of the alliance members for additional terms and conditions in the areas of (i) development, production, quantity

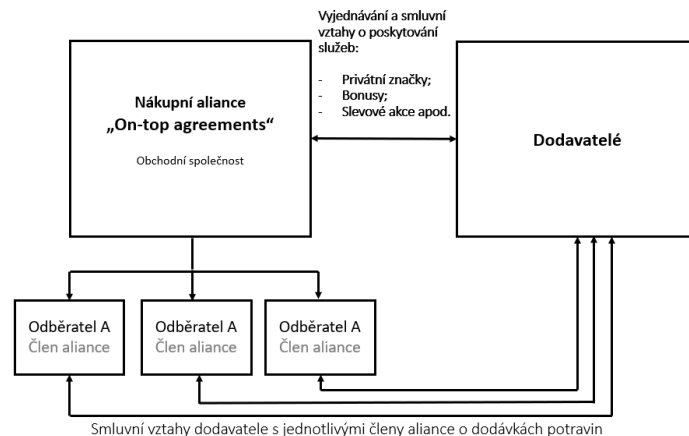
assurance and marketing of private brands; (ii) provision of services, bonuses, exclusive variations of branded products, discount promotions, etc. with approximately TOP 100 suppliers.

Purchasing alliance
“On-top agreements”
 Trading company

Bargaining and contractual relationships
on the provision of services:

- **private brands**
- **bonuses**
- **discounts, etc.**

Suppliers



Buyer A
 Alliance member

Supplier contractual relationship with individual alliance members on food supply

Figure 4 Purchasing Alliance "On-Top" Agreements

Suppliers' Alliance

Suppliers' alliances in the Czech Republic represent mainly cooperation in the form of **marketing cooperatives**, which mainly provide for their members the purchase, storage, packaging and resale of primary products, or a simpler processing at the subsequent production stage. Cooperation in the form of processors' alliance usually results in a merger of the enterprises involved. Greater links in the agricultural and food supply chains may be encountered in the context of conglomerate structures. In connection with the suppliers' alliances, attention is also drawn to Article 152 - Producers' organisations - of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, pursuant to which certain aspects of the supply chain may be coordinated by recognised producers' organisations.

Suppliers' or buyers' alliance shall mean a group of entities engaged in cooperation between the members of the alliance for the purpose for which it was established, regardless of whether or not the group is or is not a legal entity. One of the key objectives for establishing a buyers' alliance is to strengthen market power in bargaining over trade conditions for the purchase of goods, to consolidate volumes for the economically suitable production of private brands, etc.; in case of a suppliers' alliance, it is to cooperate, for example, in the processing, storage or sale of products. Proof of the alliance's existence, its activities and its structure can be based on the founding documents, documents demonstrating the ordinary day-to-day activities of the alliance and its members (e.g. logistics of the goods flows), and formal or informal agreements showing the links between the members of the alliance and their concerted action.

4. Calculation of Turnover of Buyers, Suppliers and Their Alliances

Significant market power is assessed for buyers and alliances thereof on a relative basis, i.e. by comparing the annual turnover of the buyer and the supplier (or alliance thereof) of a particular contractual relationship for the preceding financial year.

A buyer that is in a **higher turnover band** after calculating its turnover than its supplier has **significant market power** over that supplier, which is reflected in a **special responsibility** consisting in the obligation of that buyer to comply with the provisions of the Significant Market Power Act. Therefore, the buyer and the supplier are obliged to provide each other with information about their turnover when negotiating the contract at the request of the other party.⁷

Under Article 3(1) of the Significant Market Power Act, a buyer or buyers' alliances has a significant market power if its annual turnover is in a higher turnover band than the annual turnover of the supplier or suppliers' alliances. The Significant Market Power Act, similarly to the Directive (EU Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain), establishes five turnover bands in which the annual turnover of suppliers, buyers and alliances thereof is classified (see Table 1). According to Article 3(2) of the Significant Market Power Act, a buyer or a buyers' alliances has a significant market power if its annual turnover on the territory of the Czech Republic exceeds CZK 5 billion. The threshold of CZK 5 billion corresponds to the fourth turnover band of the buyer, i.e. a turnover threshold **up to EUR 350 million**. Since the main objective of the amendment was primarily to transpose the Directive, the Office considers that the threshold of CZK 5 billion of turnover achieved on the territory of the Czech Republic should also be interpreted in accordance with the aim and purpose of the Directive, i.e. it is necessary to take into account the turnover of suppliers referred to in Article 3(1) of the Significant Market Power Act.

In calculating the annual turnover of a buyer, supplier or alliance thereof, the annual turnover of the **autonomous, partner and linked enterprise** is based on the annual turnover of the micro, small and medium-sized enterprises as defined in Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises; therefore, before calculating the amount of annual turnover, it is necessary to classify the buyer, supplier or alliance thereof under one of these definitions. For this purpose, it is firstly necessary to identify the **ownership structure** of the entities under assessment and the entities that are linked to them.

The last complete accounting period is the accounting period in which the unfair trading practice was committed. In the case of ongoing or continuing infringements, the relevant accounting period shall be the financial year in which the infringement ceased.

The **annual turnover** includes sales made by the enterprise in connection with its usual activities in the exercise of its economic activity. Annual turnover does not include value added

⁷ Article 3a (14) of the Significant Market Power Act

tax. According to the European Commission, not only the turnover generated by sales of agricultural or food products, but the turnover generated by the sale of all goods or services generated by the relevant buyer or supplier is included in the turnover.

The identification of the ownership structure of the enterprise under assessment and its possible links with other entities is based mainly on the documentary evidence. **Documentary evidence** includes, for example, financial statements, personal income tax statements, extracts from public registers, constitutive documents on the establishment and changes to the relevant enterprise and its bodies, and other formal or informal agreements or contracts that show a controlling or concerted relationship. These documents are often in the form of a public deed (notarial deed).

Pursuant to Article 3a(10) of the Significant Market Power Act, the annual turnover of the supplier, buyer or alliances thereof and their partner or linked enterprises is to be determined on the basis of the financial statements and other data of all partner or linked enterprises or on the basis of consolidated accounts, if they are drawn up. The **consolidated profit and loss statement** constitutes an underlying to avoid multiple inclusion of sales in the production and processing and distribution chain in which the supplier, buyer or the alliances thereof carry out their economic activities, typically group entities.

Under Article 3a(8) of the Significant Market Power Act, in the case of **foreign enterprises**, the annual turnover is to be determined from the accounts processed by the enterprises in accordance with foreign law; if they are not available, the annual turnover can be established by other appropriate means, including an **estimation**.

Pursuant to Article 3a(13) of the Significant Market Power Act, the **foreign exchange market rate** declared by the Czech National Bank on the last day of the financial year to which the annual turnover of the enterprise relates is to be used for the conversion of currencies.

Supporting Documents for Calculation of the Annual Turnover of the Enterprise

Financial statements are the **relevant documents** on which the enterprise relies to calculate the annual turnover of an enterprise, regardless of whether it is an autonomous, partner or linked enterprise. The financial statements are prepared in accordance with the Decree on Accounting Act⁸ and also in accordance with Czech Accounting Standards (ČÚS) or IFRS⁹. The enterprise relies on the (consolidated) profit and statement or uses amounts in CZK from income rows:

(i) sales of own goods and services;

(ii) sales of goods;

⁸ Decree No 500/2002 implementing certain provisions of Act No 563/1991 on accounting for accounting entities which are entrepreneurs in the double-accounting system.

⁹ **IFRS** means International Financial Reporting Standards, i.e. a set of standards issued by the International Accounting Standards Board (<https://www.ifrs.org/>).

The annual turnover of the enterprise is the sum of the above-mentioned sales (consolidated) relating to *its normal economic activity*. Information on turnover can be obtained from:

- (i) from a collection of documents from the commercial register; or
- (ii) by fulfilling the obligation to provide information pursuant to Article 3a(14) of the Significant Market Power Act.

An enterprise which is not an accounting entity pursuant to Article 1(2) of the Accounting Act, does not keep accounts pursuant to Article 18 of the Accounting Act and carries out its economic activity on the basis of the Trade Licensing Act (natural person – entrepreneur) determines its annual turnover **on the basis of the personal income tax return** submitted to the local tax office pursuant to Article 3 of the Income Tax Act.

The **annual turnover** (revenue) **of a natural person – entrepreneur** is the sum of the income earned by the entrepreneur from the following activities, which, pursuant to Article 3(1)(a) to (e) of the Income Tax Act, are included in the subject of personal income tax:

- a) income from employment (Article 6);
- b) income from self-employment (Article 7);
- c) income from capital (Article 8);
- d) rental income (Article 9);
- e) other income (Article 10).

Procedure for Calculating Annual Turnover

Where the supplier or buyer under consideration is an **autonomous enterprise**, in accordance with Article 3a(5) of the Significant Market Power Act, the enterprise's annual turnover is determined as the sum of the sales of products and services and the sale of goods during the 12-month financial year. Annual turnover does not include value added tax.

If the supplier, buyer or alliance under consideration is a **group of partner and/or linked enterprises** as defined in Article 3a of the Significant Market Power Act, the following shall also be added to the annual turnover of such supplier, buyer or alliance, pursuant to that provision of the Significant Market Power Act:

- 100% of the annual turnover of directly or indirectly **linked enterprises**;
- The annual turnover of each partner enterprise **in proportion** to the **percentage** of capital or voting rights, whichever is higher. In the case of mutual ownership, the higher percentage is decisive. In addition, the turnover of the enterprises that are linked to the partner enterprise(s) must be added to the turnover of the partner

enterprise(s). The turnover of the partner enterprise(s) should also be added to the turnover of the linked enterprise(s). In order to avoid endless calculations, only the **first partner enterprise** is included in the annual turnover of the enterprise under consideration. The annual turnover of the partner of the enterprise under assessment shall not be included in the calculation of the aggregated annual turnover.

- If a group of enterprises is a buyers' or suppliers' **alliance**, under Article 3a(4) of the Significant Market Power Act, the turnovers of **all the members of the alliance** and the **alliance** are aggregated, in the case of an alliance with a legal form. The annual turnovers of the members of the alliance and the alliance shall be added to the annual turnovers of their potential partner and linked enterprises pursuant to Article 3a(3)(c) and (d) of the Significant Market Power Act.
- Pursuant to Article 3a(3)(d) of the Significant Market Power Act, enterprises which are shown to constitute a linked enterprise with the enterprise under assessment **through a natural person** or a **group of natural persons** by **acting in concert** in the exercise of their economic activities or in part of their activities **on the same market** or **on directly downstream or upstream markets**¹⁰ shall be included in the annual turnover of the supplier or buyer under consideration.

Examples of the Procedure for Calculating Annual Turnovers

The four model examples below set out the procedures for calculating the annual turnovers of the supplier, buyer or alliances thereof.

¹⁰ According to the explanatory memorandum to the Significant Market Power Act, the terms 'same market', 'neighbour market', 'downstream market' or 'previous market' must also be interpreted in accordance with the Commission's recommendation. The official translation of Article 3(3) of the Commission Recommendation into Czech, published on 11 January 2023 in the Collection of Laws of the Czech Republic (amount 5) as the Communication of the Ministry of Industry and Trade on the publication of the Czech version of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, considers the markets for products or services directly downstream of the relevant market as a 'neighbouring market'.

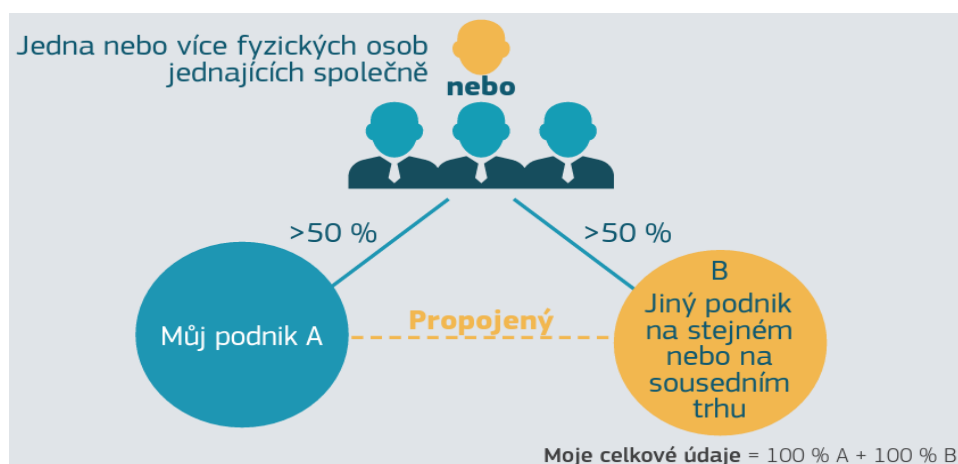


Figure 5 Linked Enterprises Through Natural Persons
Source: SME Definition User Guide

Figure 5 – Explanatory Notes

- Jedna nebo více fyzických osob jednajících společně: One or more natural persons negotiating jointly
- Nebo: Or
- Můj podnik A: My enterprise A
- Propojený: Linked
- B Jiný podnik na stejném nebo na sousedním trhu: B Other enterprise on the same or in a neighbouring market
- Moje celkové údaje = 100 % A + 100 % B: My total data = 100% A + 100% B

Figure 5 presents two seemingly autonomous enterprises operating in the same market (e.g. mills) and on the basis of formal and informal agreements (a mutual understanding procedure) acting in concert vis-à-vis third parties (suppliers of wheat and bakeries) through natural persons (members of the executive management of the companies = indirect owners according to the extract from the Register of Beneficial Owners). Under Article 2 of the Significant Market Power Act, it is an alliance without legal personality.

Annual turnover of enterprise under consideration A pursuant to Article 3a of the Significant Market Power Act (3)(d) = annual turnover of A + annual turnover of B

Figure 6 shows the suppliers or buyer in particular as part of a business group consisting of partner enterprise B and its linked enterprise C; on the other hand, A represents an enterprise linked with the enterprise under assessment through an indirect owner (member of the board of directors). From the point of view of the enterprise under consideration, enterprise A is active in a market which is directly downstream market in which the enterprise under assessment operates (for example, the sugar beet producer is the enterprise under consideration and the sugar factory is enterprise A). The enterprise under assessment and A,

through the indirect owner, act in concert with other suppliers of the sugar factory (for example, the quantity, timing and object of the supplies).

$$\text{Annual turnover of the enterprise under consideration} = 100 + 0.32 * (30 + 50) + 500 + 0.29 * 40$$

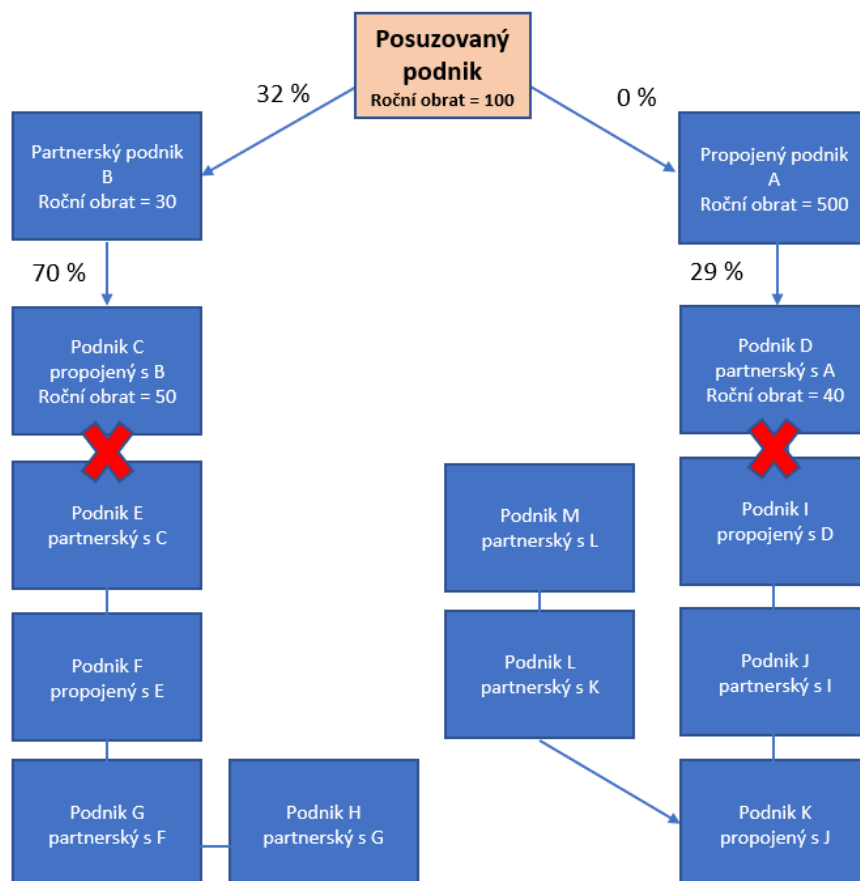


Figure 6 Group of Partner and Linked Enterprises

Figure 6 – Explanatory Notes

- Posuzovaný podnik, Roční obrat = 100: enterprise under assessment, Annual turnover = 100
- Partnerský podnik B, Roční obrat = 30: Partner enterprise B, Annual turnover = 30
- Podnik C propojený s B, Roční obrat = 50: Enterprise C linked to B, Annual turnover = 50
- Podnik E partnerský s C: Enterprise E partner with C
- Podnik F propojený s E: Enterprise F linked to E
- Podnik G partnerský s F: Enterprise G partner with F
- Podnik H partnerský s G: Enterprise H partner with G
- Propojený podnik A, Roční obrat = 500: Linked enterprise A, Annual turnover = 500

- Podnik D partnerský s A, Roční obrat = 40: Enterprise D partner with A, Annual turnover = 40
- Podnik I propojený s D: Enterprise I linked to D
- Podnik J partnerský s I: Enterprise J partner with I
- Podnik K propojený s J: Enterprise K linked to J
- Podnik M partnerský s L: Enterprise M partner with L
- Podnik L partnerský s K: Enterprise L partner with K

Figure 7 shows the assessed enterprise A, which represents the supplier of company B in which it holds a share equivalent to as the partner enterprise. Enterprise C, a wholly owned subsidiary of B, is active in the immediate upstream market. Enterprise D is linked to Enterprise B through a natural person (direct owner). D is active in the directly downstream market.

Annual turnover of the enterprise under assessment A = annual turnover of A + percentage of A's share in partner enterprise B * (annual turnover of B + annual turnover of C + annual turnover of D)

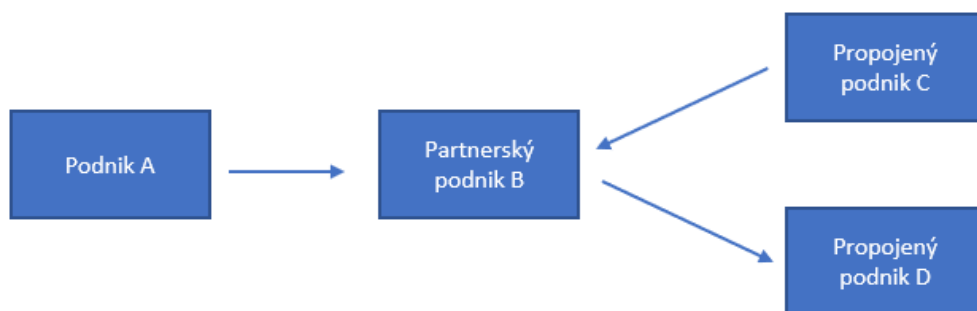


Figure 7 Group of Enterprises Active in Neighbouring Markets

Figure 7 – Explanatory Notes

- Podnik A: Enterprise A
- Partnerský podnik B: Partner enterprise B
- Propojený podnik C: Linked enterprise C
- Propojený podnik D: Linked enterprise D

Figure 8 – if the enterprise under assessment is A, the amount of its annual turnover is calculated as the sum of A's annual turnover and the annual turnover of B, which represents the linked enterprise with A through natural persons (indirect owners – members of the executive bodies of the enterprises). In addition to B's annual turnover, 30% of the annual turnover of D, which is a partner of B, will be added to B's annual turnover.

$$A = A + B + 0.3 * D$$

If B is considered to be an enterprise under assessment, its annual turnover is calculated as the sum of B's annual turnover with A's annual turnover and the sum of the annual turnover of D and C (linked enterprises through natural persons, C is active in a directly downstream market and acts in agreement with D), multiplied by the percentage of the share of enterprise B in partner enterprise D.

$$B = B + A + 0.3 * (D + C)$$

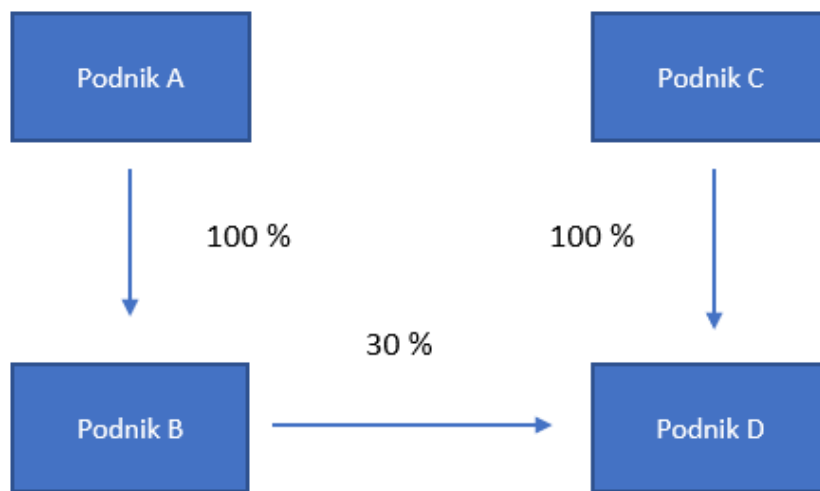


Figure 8 Business Grouping

Figure 8 – Explanatory Notes

- Podnik: Enterprise

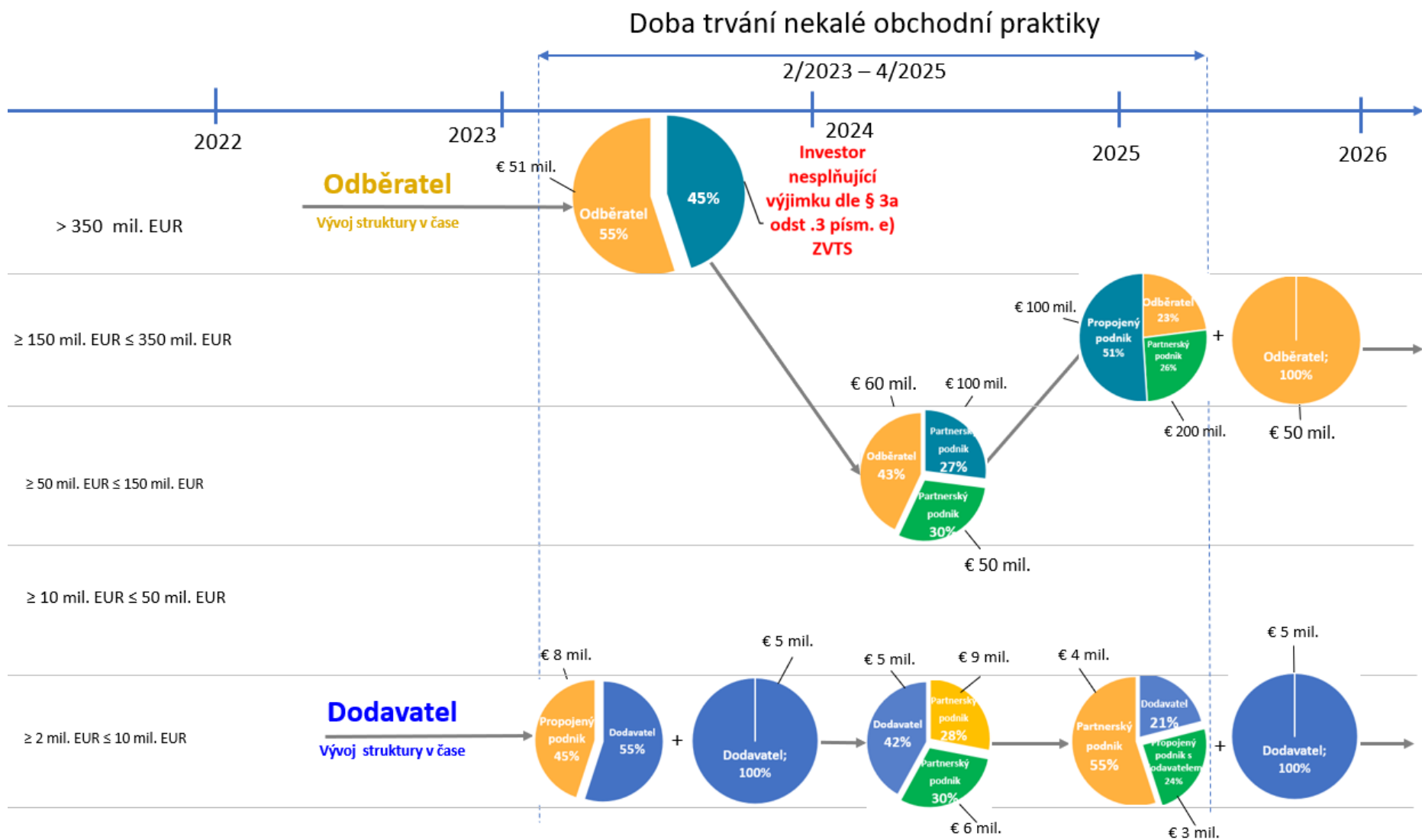


Figure 9 Model Example of Inclusion of Supplier and Buyer in Turnover Bands

Figure 9 – Explanatory Notes

- Doba trvání nekalé obchodní praktiky: Duration of unfair trading practice
- Odběratel, Vývoj struktury v čase: Buyer, Structure development over time
- Odběratel: Buyer
- Investor nesplňující výjimku dle § 3a odst. 3 písm. E) ZVTS: Investor not complying with the exemption under Article 3a(3)(E) of the Significant Market Power Act
- Partnerský podnik: Partner enterprise
- Propojený podnik: Linked enterprise
- Dodavatel, Vývoj struktury v čase: Supplier, Structure development over time
- Dodavatel: Propojený podnik s dodavatelem: Supplier: Connected enterprise with the supplier

Figure 9 shows the model allocation of one supplier and one buyer, consisting of an autonomous enterprise, or an enterprise and a partner/linked enterprise, to the relevant turnover band in the event of the Significant Market Power Act infringement between February 2023 and April 2025, in a situation where there was also a change in the ownership structure of the buyer and supplier during the reporting period.

The annual turnover of the supplier and buyer under consideration during the period of the unfair trading practice is determined on the basis of the financial statements as at 31. 12. 2023, 31. 12. 2024 and 31.12. 2025.

On the basis of the Report on Relations, presented in the annual report of the buyer under consideration, the accounts as at 31. 12. 2023 and minutes of voting at the general meeting and board of directors can be demonstrated that the *investor* participated in the management of the business. The investor is a municipality with a population of 100 thousand inhabitants and a budget of > EUR 10 million. Therefore, the exemption under Article 3a(3)(e) of the Significant Power Act does not apply when calculating the annual turnover of the buyer under consideration and the buyer assessed, linked to the municipality, will be included in the highest turnover band.

The Report on Relations and the 2024 financial statements show that two partner enterprises have a share of the buyer's equity capital – one at 27% and the other at 30%. These two partner enterprises do not act in concert, so their turnover is added to the amount of the buyer's turnover only in proportion to: $0.3 * 50 + 0.27 * 100 + 60 = \text{EUR } 102 \text{ million}$.

Furthermore, from the buyer's accounts at 31. 12. 2025 (from the Report on Relations) it can be seen that it exercises decisive influence over the buyer under consideration on the basis of a majority shareholding of 51% of the related enterprise, which is the controlling entity. The annual turnover of the linked enterprise will be added to the annual turnover of the buyer considered at 100%. In addition, an annual turnover of 26% of the partner enterprise will be added to the annual turnover of the buyer considered.

The annual turnover of the buyer for 2025, calculated on the basis of the accounts as at 31 12. 2025, is $= 50 + 0.26 * 200 + 100 = \text{EUR } 202 \text{ million}$.

Furthermore, the figure shows that in 2025 the supplier acts in agreement with the linked enterprise through a natural person in the exercise of voting rights in the partner enterprise. The turnover of the linked enterprise and the proportional turnover of the partner enterprise corresponding to the participation of the supplier and the linked enterprise in the capital of the partner enterprise shall be added to the annual turnover of the supplier and the linked enterprise: $(0.21 + 0.24) * 4 + 5 + 3 = \text{EUR } 9.8 \text{ million}$.

Furthermore, it is clear from the figure that the buyer under assessment was in a higher turnover band than its supplier between 2023 and 2025, so that it has a significant market power for the entire duration of the unfair trading practice.

Calculation of Alliances' Annual Turnover

According to Article 3a(4) of the Significant Market Power Act, the annual turnover of the buyers' or suppliers' alliance is the sum of the annual turnover of all the members of the alliance. In accordance with Article 3a(3)(b) to (d), the annual turnover of the partner and linked enterprises is included in the annual turnover of a member of the alliance.

In the case of an **alliance without legal personality**, the annual turnover of the members of the alliance, including partner and linked enterprises linked to them, shall be included in the calculation of turnover, see Figure.

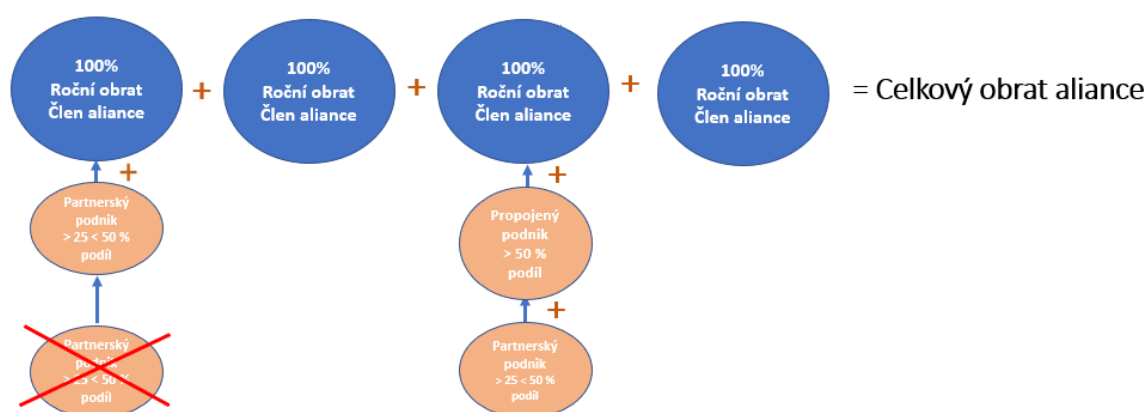


Figure 10 Annual Turnover of the Alliance Without Legal Personality

Figure 10 – Explanatory Notes

- 100 % Roční obrat, Člen aliance: 100% Annual turnover, Alliance member
- Partnerský podnik, podíl: Partner enterprise, share
- Propojený podnik, podíl: Linked enterprise, share
- Celkový obrat aliance: Total turnover of the alliance

The annual turnover of the **alliance with legal personality** consists of the annual turnover of the members of the alliance (including partner and linked enterprises) to which the annual turnover of the alliance is added, see Figure 11. In order to avoid multiple inclusion of sales in the calculation of the annual turnover due to the flow of products, goods and services within a trading corporation, a consolidated profit and loss statement or similar methods of consolidation shall be used.

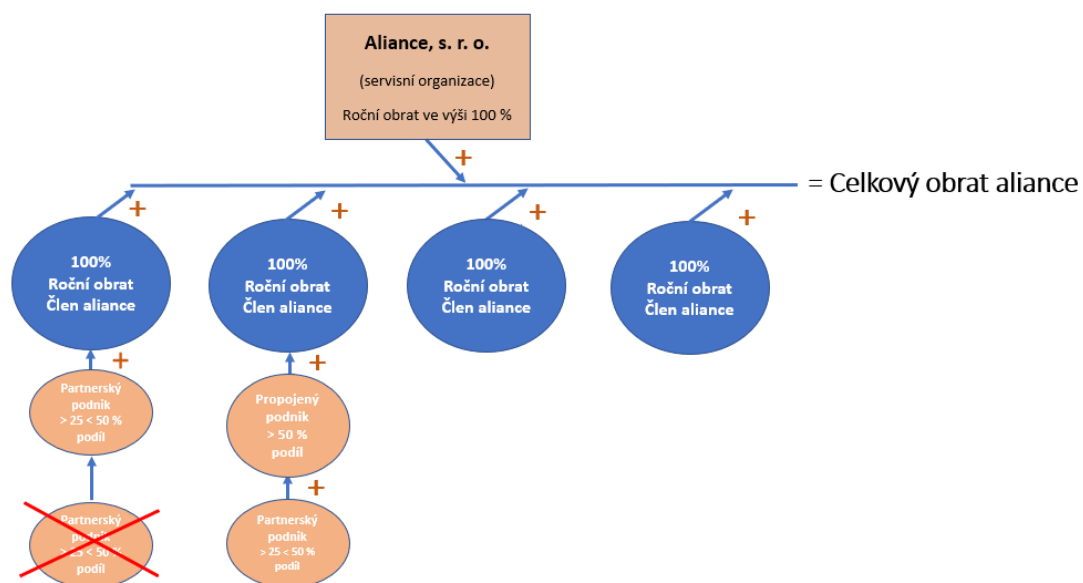


Figure 1 Annual Turnover of the Alliance With Legal Personality

Figure 11 – Explanatory Notes

- Aliance, s.r.o. (servisní organizace), Roční obrat ve výši 100 %: Aliance, s.r.o. (service organisation), Annual turnover of 100%
- Partnerský podnik, podíl: Partner enterprise, share
- Propojený podnik, podíl: Linked enterprise, share
- Celkový obrat aliance: Total turnover of the alliance

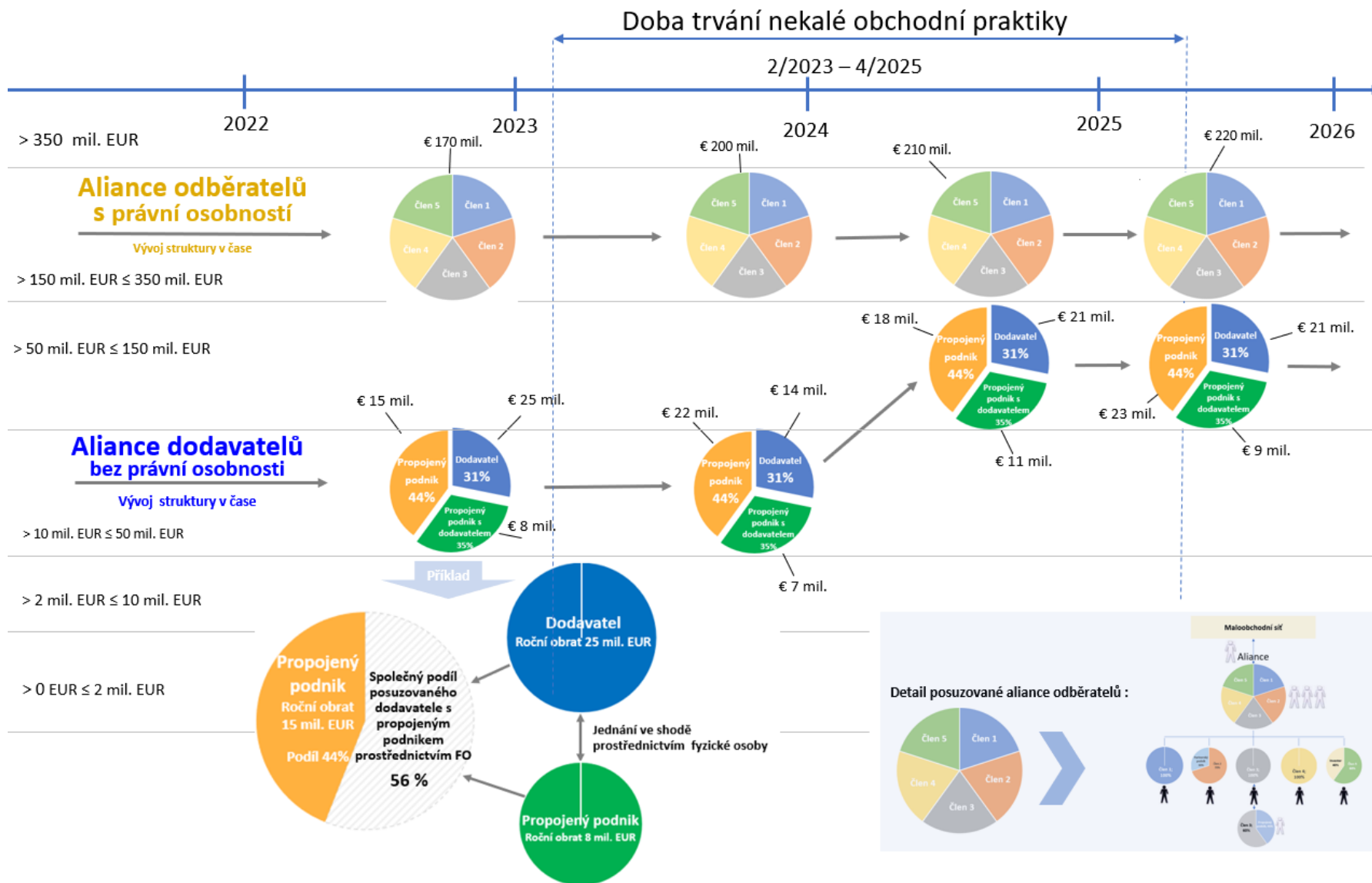


Figure 12 Calculation of Turnover of Suppliers' and Buyers' Alliances

Figure 12 – Explanatory Notes

- Doba trvání nekalé obchodní praktiky: Duration of unfair trading practice
- Aliance odběratelů s právní osobností: Buyers' alliance with legal personality
- Vývoj struktury v čase: Structure development over time
- Aliance dodavatelů bez právní osobnosti: Suppliers' alliance without legal personality
- Propojený podnik, Roční obrat 15 mil. EUR, podíl 44 %: Linked enterprise, Annual turnover EUR 15 million, 44% share
- Společný podíl posuzovaného dodavatele s propojeným podnikem prostřednictvím FO 56 %: Combined share of the assessed supplier with the linked enterprise through a natural person 56%
- Dodavatel, Roční obrat 25 mil. EUR: Supplier, Annual turnover EUR 25 million
- Propojený podnik, Roční obrat 8 mil. EUR: Linked enterprise, Annual turnover EUR 8 million
- Jednání ve shodě prostřednictvím fyzické osoby: Acting in concert through a natural person
- Detail posuzované aliance odběratelů: Details of the buyers' alliance under consideration
- Doba trvání nekalé obchodní praktiky: Duration of UTP
- Propojený podnik s dodavatelem 35 %: Linked enterprise with a supplier 35%

Figure 12 illustrates the model of the suppliers' alliance without legal personality and the buyers' alliance with legal personality (share company) and their inclusion in the relevant turnover band in case of the Significant Market Power Act infringements between February 2023 and April 2025, in the absence of changes in the (ownership) structure of the buyers' and suppliers' alliance.

The **suppliers' alliance** consists of three members, two of which cooperate in the production and processing of agricultural production and jointly control the third member (agricultural producer) by acting in concert when exercising the voting rights attached to the ownership of their shares in the processor. The processor of agricultural production provides packaging and logistics services to producers.

Pursuant to Article 3a(4) of the Significant Market Power Act, the annual turnover of the alliance is calculated as the sum of the turnovers of the individual members of the alliance: for the suppliers' alliance under assessment, EUR 48 million for 2023, EUR 50 million for 2024 and EUR 53 million for 2025.

For the members of the suppliers' alliance under consideration, the existence of other partner or linked enterprises through direct or indirect beneficial owners has not been demonstrated.

The **buyers' alliance** is composed of five members. Members 1 and 4 are an autonomous enterprise. Member 2 consists of an enterprise and a partner enterprise. Member 3 are linked enterprises operating in the same market. Member 5 is co-owned by an investor who does not participate in the management of the enterprise and does not exercise decisive influence over it.

Enterprises carry out their economic activities in the *same market* and form an alliance based on joint control of a joint stock company – an alliance by asserting decisive influence in the alliance, i.e. by exercising the majority of voting rights in a joint stock company by acting in concert.

The alliance's market power includes a member 2 partner enterprise, a linked enterprise of member 3 and linked enterprise of the alliance represented by a subsidiary of the alliance (retail network) in which the alliance holds 100% of the equity capital.

The alliance prepares the accounts in the form of consolidated accounts (full consolidation method). The consolidated financial statements shall include the annual turnover of the alliance and the subsidiary (retail network). It does not include (duplicate) the annual turnover of the members of the alliance.

The annual turnover of the buyers' alliance under consideration shall be equal to the sum of the annual turnovers of the members of the alliance and the alliance: amounts to EUR 200 million at 31. 12. 2023, EUR 210 million at 31. 12. 2024 and EUR 220 million at 31. 12. 2025.

Since the annual turnover of the buyers' alliance under consideration is in a higher turnover band than that of the suppliers' alliance throughout the reporting period, the buyers' alliance under assessment has significant market power vis-à-vis the suppliers' alliance under assessment during the period of the unfair trading practice.

Significant market power of a buyer is assessed in relative terms, i.e. the amount of turnover of a particular buyer and its supplier, which are parties to a particular buyer-supplier relationship. Before determining turnovers, the ownership structure of the buyer and supplier under consideration and its possible connection with other entities shall be verified. Accordingly, the buyer, supplier or alliances thereof shall be assigned to an autonomous, partner or linked enterprise; after this subclassification, turnover shall be calculated, the entities under consideration shall be classified in one of the five turnover bands and the existence or absence of significant market power is concluded. This data shall be determined primarily on the basis of relevant supporting documents.

The calculation of the market power shall be based on the turnover achieved by the relevant entity. The European Commission calls for the global position and bargaining power of an enterprise to be taken into account, so it is necessary to include in the annual turnover of the buyer/supplier or alliances thereof not only the turnover generated by the sale of agricultural or food products, but from the sale of all products or from the provision of all services. In addition, the turnover of linked enterprises and the turnover of the partner enterprises must also be included.

In order to ensure mutual information and legal certainty, under Article 3a(14) of the Significant Market Power Act, buyers and suppliers are required to provide each other, at the request of the other contracting party, with information on the amount of their annual turnover.

5. Overview of Obligations of Buyers with Significant Market Power

This chapter describes the basic obligations of a buyer with significant market power in its relationship with a supplier of agricultural and food products. Two basic categories of such obligations can be identified, particularly the obligation to comply with the written form and content of contracts and the obligation to avoid specifically defined unfair trading practices. Failure to comply with these obligations may result in a fine of up to CZK 10 million or 10% of the net turnover of the buyer with significant market power for the last completed accounting period of 12 months; it is therefore appropriate to pay particular attention to them.

Form and Requirements of the Contract

The basic rules regulating the elements of contracts and contractual terms between a supplier and a buyer with significant market power are now set out in Article 3b of the Significant Market Power Act. It defines the mandatory elements of contracts in buyer-supplier relationships beyond the scope of the Civil Code, which aim to ensure transparency of cooperation between the supplier and the buyer.

In addition to the requirement that the contract be in writing and that it must be concluded prior to the commencement of the supply or processing of agricultural or food products or the receipt or provision of associated services, the aforementioned provision specifies the content of the contract with regard to its subject matter, as well as the obligation of a buyer with significant market power to submit at least one copy of the contract to the supplier immediately after its conclusion.

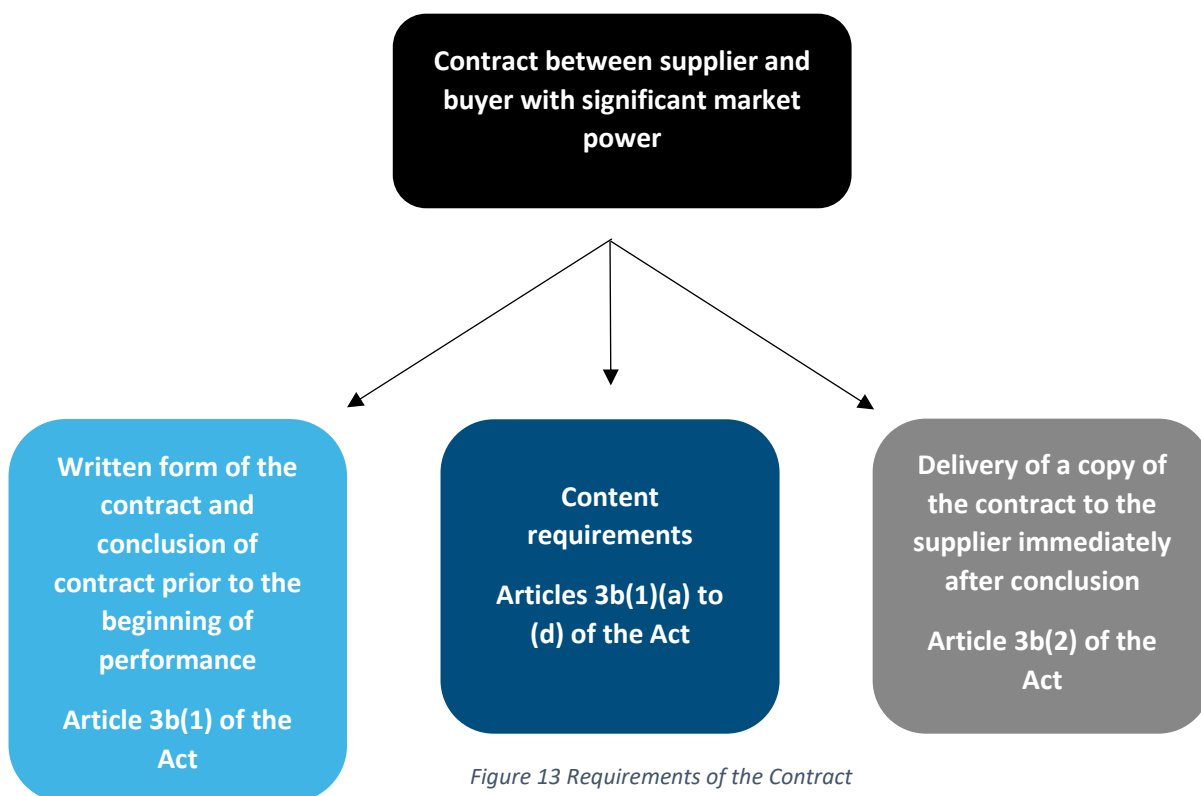


Figure 13 Requirements of the Contract

Form of Contract

A key requirement of the Czech legislation is the mandatory written form of the contract between the supplier and the buyer with significant market power. The requirement of a written form of contract has been stipulated in Czech legislation for more than ten years. This institution has contributed to the overall improvement of contractual relations and has proved its worth in the monitoring activities carried out by the Office. The Czech legislation goes beyond the EU minimum standard in this respect, as the Directive does not comprehensively provide for a mandatory written form (it only provides for the possibility of requesting written confirmation of the terms of the contract).

Since the Significant Market Power Act does not provide a specific way of fulfilling the requirement of a written document, this requirement must be interpreted in accordance with the provisions of Article 561 of the Civil Code, and the requirement of a written document must be applied to the entire contracting process. The obligation to put the contract in writing is fulfilled if the form of the contract makes possible to capture its content and to guarantee the reliability of its origin and the integrity of its content over time. Thus, the requirement of a written form of the document does not have to be fulfilled exclusively by means of a paper form, but also through the use of other forms of written representation of the text, for example by means of ensuring the authenticity and integrity of the text, typically in the form of contracts which are concluded electronically.

The specific form of the written procedure should be agreed in advance in the contract.

Options of written conclusion of the contract

- ➡ A document with the handwritten signature of the person acting.
- ➡ Fax message, if the original document is signed with a handwritten signature.
- ➡ Data message delivered to the data box.
- ➡ An electronic message sent by means of an electronic information exchange system or by means of certified services, if the use of procedures guaranteeing the authenticity of the origin and the integrity of the content is agreed.
- ➡ E-mail message, if it is signed by:
 - ↳ an electronic signature, provided that measures to ensure the authenticity of the origin and the integrity of the content (e.g. a pre-agreed e-mail address with a sufficient level of security and prevention of access by others) are agreed and taken at the same time;
 - ↳ certified electronic signature;
 - ↳ by a guaranteed electronic signature based on a qualified certificate for electronic signature;
 - ↳ qualified electronic signature.

Figure 2 Options of Written Conclusion of the Contract

As can be seen from Figure 14, the written form is kept pursuant to Article 562 of the Civil Code not only in the case of a standard documentary form of contract, but also in the case when the legal act is performed by an electronic means which allows the content to be captured and the person acting to be identified. This reflects the constantly developing possibilities of electronic communications, which is extremely important for the further development of cross-border transactions in the EU internal market and is increasingly used in practice. Indeed, on 19 September 2016, Act No. 297/2016 Coll. on services creating trust for electronic transactions was published in the Collection of Laws in response to the adoption of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. This Regulation established the principle that an electronic document shall not be denied legal effects on the basis of its electronic form.

Another possible way to fulfil the legal requirements of a written form of contract is to conclude the contract electronically, for example by using certified services allowing electronic signature of documents. When a commercial contract is concluded electronically using electronic tools, a simple electronic signature is used, and the entire process of signing the document by the parties is recorded in a protocol attached to the contract in question. The

authenticity of the origin and the integrity of the content are guaranteed by a certificate from the company providing the service. Alternatively, the EDI (Electronic Data Interchange) system or similar electronic data exchange systems may also be used. These may be used provided that both parties to the contract have expressly agreed on the use of the system in advance. It is essential that the parties agree on specific terms and conditions and set the rules of mutual communication appropriately, taking into account the technical possibilities of both parties. It is essential that both parties have the same level of knowledge of the contractual arrangements and that these arrangements comply with the mandatory formal and substantive requirements of the contract.

Content Requirements

The Significant Market Power Act lays down in Article 3b(1)(a) to (d) the content of a contract between a supplier and a buyer with significant market power. These provisions are also amended compared to the previous legislation. Some of the existing elements have been removed from legislation (for example, the guaranteed validity of the purchase price), but others have been added (an estimate of the cost of services).

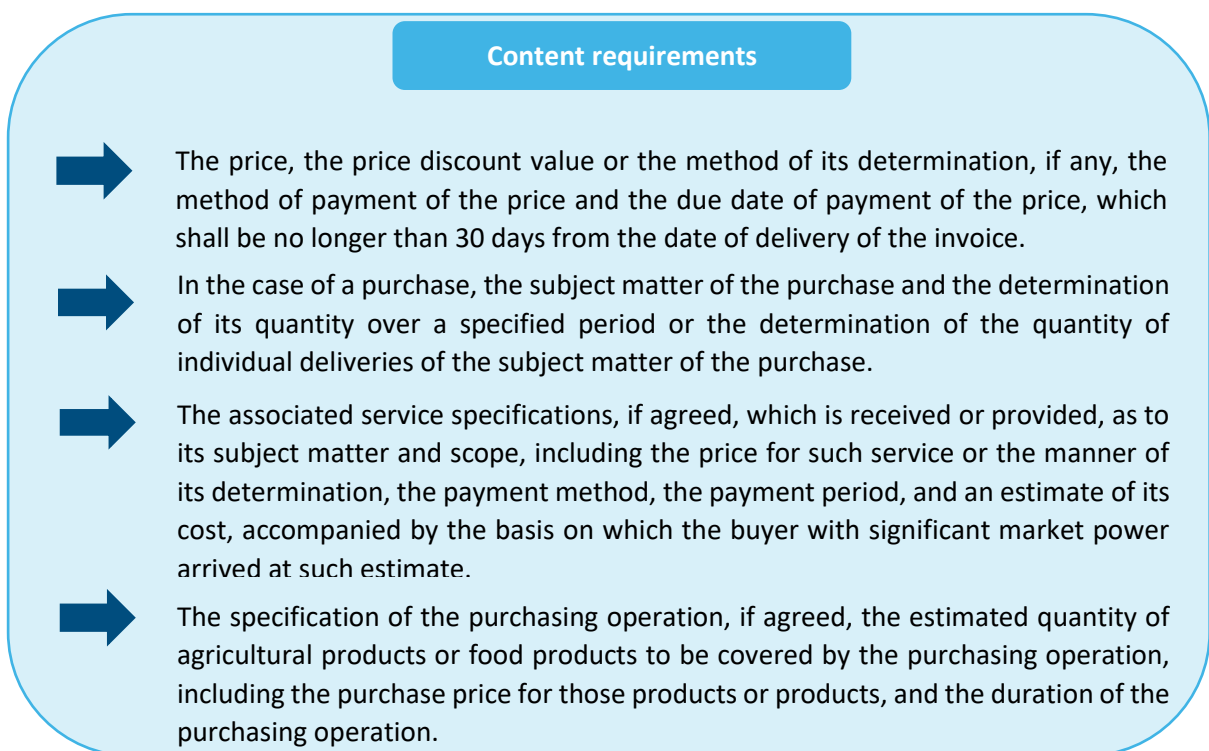


Figure 3 Content Requirements of the Contract

Any errors in the form of the contract, the absence of content or the failure to hand over a copy of the contract to the supplier shall not constitute an absolute invalidity or the apparentness of such behaviour. Any consequences for the commercial-legal relationship shall be assessed in accordance with the general legal provisions of the Civil Code. The Significant

Market Power Act sets out the public-law consequences of infringement of legal obligations (liability for offences for infringement of the law). The Significant Market Power Act does not deal with specific private law implications. In cases of non-compliance with the statutory requirement on the form and particulars of the contract, it is necessary to draw any private law consequences under the relevant provisions of the Civil Code.

Unfair Trading Practices

The transposing amendment to the Significant Market Power Act has brought a number of changes in the area of prohibited practices. One of them was the removal of the general clause on abuse of significant market power and the introduction of the black and grey list of unfair trading practices. The more general description of unfair trading practices reflected in the Directive 1999/93/EC provides a certain interpretative aid for these lists. According to the Directive 1999/93/EC, these are *practices which deviate significantly from the principles of fair trading, are contrary to good faith and fair dealing and are imposed unilaterally by one business partner on another*. In addition, they may be *practices (de facto conduct) or contractual arrangements* through which the stronger party to the contract can impose an *unjustified and unreasonable transfer of economic risk* or create a significant imbalance between the rights and obligations of the parties.

While the list of black practices contains the facts expressed in Article 4(2), the list of grey practices reflects the conduct prohibited under Article 4(3):

- 1) practices that are prohibited at all times without exception; and
- 2) practices which are prohibited unless the statutory requirements (i.e. the conclusion of a prior written agreement with specified particulars) have been met.

The list in Article 4(2) of the Significant Market Power Act contains a list of 22 prohibited practices, which include a wide variety of acts that meets some aspect of the general characteristics of an unfair trading practice (e.g. dishonesty, unjustified transfer of risks etc.). As of 1 January 2023, the Significant Market Power Act does not require a frequency attribute for many of the prohibited practices in order to meet the statutory prerequisites of the relevant offence. It is therefore not necessary that the prohibited conduct (i) last for a longer period of time or (ii) manifest itself in relation to multiple suppliers.

The list of conditionally prohibited practices in Article 4(3) of the Significant Market Power Act contains practices that are prohibited provided that the buyer with significant market power fails to comply with the statutory requirement of written agreement before the supply of agricultural or food products or associated services. Specifically, there are three potentially unfair trading practices. Unlike the unfair practices listed in Article 4(2), these are services which may not pose a risk or threat to the buyer-supplier relationship. These are often services that can increase the efficiency of the supply chain and may represent an economic benefit for many suppliers. However, such services shall be properly negotiated in writing before the supply of agricultural or food products or services begins.

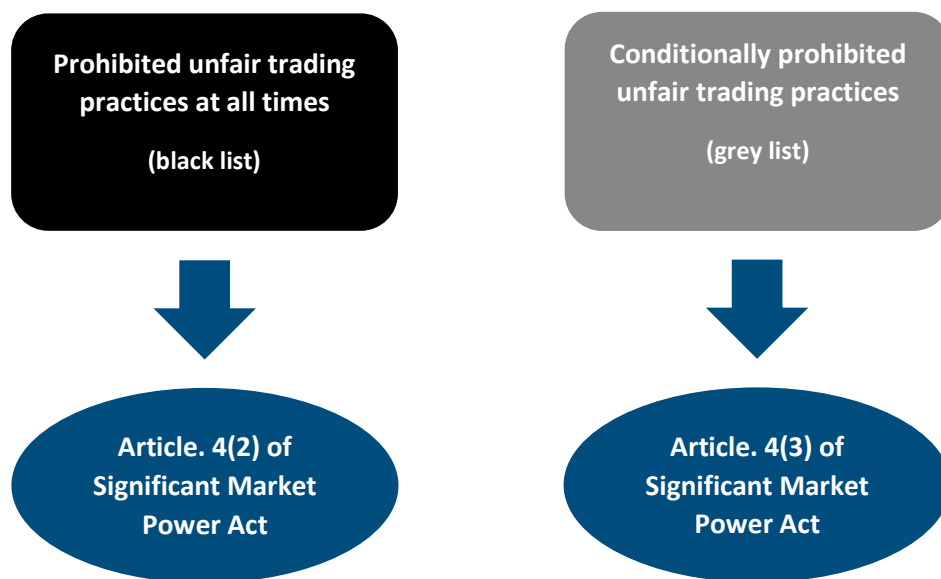


Figure 46 Unfair Trading Practices

Unfair Trading Practices Linked to a Contract and Its Requirements

As indicated above, the form and requirements of the contract are undoubtedly one of the key aspects of the buyer-supplier relationship. Therefore, some of the absolutely prohibited unfair trading practices are directly related to contracts and the way in which contractual terms are negotiated.

1. A buyer with significant market power negotiates or applies **contractual terms that create a significant imbalance in the rights and obligations** of the parties to the disadvantage of the supplier (Article 4(2)(a) of the Act).

Buyers with significant market power are prohibited from negotiating or applying contractual terms and conditions that create a significant imbalance in the rights and obligations of the parties, provided that the deviation is material, perceptible, without objective justification, or such that the average supplier would not accept it even in a relationship with a buyer that does not have significant market power. In particular, a fair allocation of the rights and obligations between the parties and the negotiation of terms and conditions which are not burdensome for the supplier are decisive. As an example, a model situation can be given where the buyer is entitled to unilaterally set off a receivable from the buyer, or to assign it to a third party, to stop it or otherwise burden it, independently of the supplier. However, the supplier is not granted such rights and is limited to the consent of the buyer in case of disposal of the receivable or to a contractual penalty for non-compliance with the above procedure.

2. A buyer with significant market power provides or receives a payment, discount or other consideration for which the amount, subject matter and extent of the consideration to be provided for the payment, discount or other performance **were not negotiated in writing before the commencement of the performance to which the payment¹¹**, discount or other performance relates or **adequate performance was not provided for the payment, discount or other performance** (Article 4(2)(b) of the Act).

The purpose of the merits is to clarify the various bonus and discount schemes applied by the buyer and to ensure that the supplier is adequately compensated. It prohibits the application or receipt of any payment, discount or other consideration the amount, subject matter and scope of which have not been agreed in writing prior to the supply of the foodstuffs or services to which the payment, discount or other consideration relates, and also obliges the buyer to negotiate transparently each of the contractual terms and conditions which constitute a performance by the supplier vis-à-vis the buyer. It further provides that the consideration given for such payment, discount or other consideration must be reasonable. As regards the adequacy of the performance, the economic value and the normal value of the consideration are decisive, and a reasonable consideration may be considered to be a performance which will ultimately be beneficial to both parties to the contract and which, in terms of its value, is at least broadly equivalent to the performance of the other party to the contract. An example would be a situation where the supplier is forced to use a service without demanding it and without obtaining a specific benefit from that service. There may also be situations where the supplier is forced to bear the full cost of the services offered, although the benefits of such services will be primarily transferred to the buyer.

¹¹ The supply or processing of agricultural or food products or the provision of associated services are considered to be transactions.

3. A buyer with significant market power negotiates or applies **different contractual terms and conditions** of the purchase or sale of agricultural or food products or for the provision of associated services for a comparable transaction without just cause (Article 4(2)(c) of the Act).

The above-mentioned merits prohibit unequal treatment of suppliers without a legitimate reason. In principle, therefore, different contractual terms cannot be agreed or applied for the purchase or sale of agricultural or food products or for the provision of services for comparable performance without a fair reason for the buyer with significant market power to do so. The aim of this provision is to avoid situations where the buyer does not treat all its suppliers equally and purposefully favours or disadvantages certain suppliers. An example of such behaviour could be a situation where the buyer links the price for a particular service provided to several suppliers to the turnover of each other (for example, the higher the turnover, the lower the price for the service), where it is quite clear that the turnover of the individual suppliers may be diametrically opposed.

4. A buyer with significant market power **changes autonomously the contractual terms and conditions** of the purchase or sale of agricultural or food products as regards the frequency, manner, place, timing or quantity of individual deliveries, quality standards, payment terms or prices, or the terms and conditions of associated services provided (Article 4(2)(d) of the Act).

This provision prohibits arbitrary changes to contractual terms by a buyer with significant market power made without the agreement of the supplier, since such conduct may be regarded as a significant divergence from the principle of *pacta sunt servanda*, which forms the fundamental building block of the principle of fairness. Arbitrariness in this case means the assertion of one's own will without regard to the will of the other party, including the possibility of unilaterally asserting or applying conduct outside the original content and purpose of the contract. An example of arbitrary conduct is where the buyer unilaterally notifies the supplier that a contractually agreed provision will no longer be applied by the supplier, whereby the conduct results in prejudice to the rights of the other party and a divergence from the established practice of the parties.

5. A buyer with significant market power **fails to comply with the written form** of the contract or **fails to negotiate the mandatory requirements** of the contract or **fails to deliver a single copy** of the contract to the supplier (Article 4(2)(f) of the Act).

The above-mentioned merits relate to the failure of the buyer to comply with its obligations regarding transparency and clarity of the agreed contractual arrangements. The Significant Market Power Act does not provide that a negotiation which lacks a written form is absolutely invalid. Nor can it be said that a contract not containing certain mandatory elements is in itself absolutely invalid or apparent. The Act on Significant Market Power only sets out the public law consequences of non-compliance with the requirements of the Act. This consequence is liability for the offence of failing to comply with the form of the contract, the mandatory content or the procedural obligation after the conclusion of the contract. An example is a situation where a buyer enters into a contract with a supplier for the provision of services for consideration, but which lacks certain elements of a contract for services pursuant to Article 3b(1)(c) of the Significant Market Power Act. Due to the missing elements, the supplier is not able to verify whether the service is actually provided by the buyer to the appropriate extent and quality.

6. A buyer with significant market power **cancels an order for perishable agricultural or food products less than 30 days before the date of delivery** (Article 4(2)(o) of the Act).

The purpose of this provision is to exclude the conduct of a buyer with significant market power consisting in transferring all the risks associated with the non-sale of previously ordered perishable products (e.g. meat, dairy products, etc.) to the supplier, who will be forced to bear the possible negative consequences of such unilateral action of the buyer in its own property sphere, as it will not be able to find an alternative and adequate output of these perishable products in such a short time frame.

Other Prohibited Unfair Trading Practices

As mentioned above, the Significant Market Power Act divides unfair trading practices into two lists depending on whether they are prohibited at all times or only in certain circumstances (failure to comply with an ex ante written agreement pursuant to Article 3b of the Significant Market Power Act). In addition to cases of unfair trading practices linked to a contract, other practices are prohibited by the Significant Market Power Act. An analysis of these is given in the following paragraphs of this chapter.

a) Practices on the Black List

1. A buyer with significant market power **makes its consent** to the conclusion of a contract for the purchase or sale of agricultural or food products or the provision of associated services conditional on the purchase of further supplies (Article 4(2)(e) of the Act).

In practice, this will most often involve the practice of companies which, in the position of a buyer with significant market power, will make their consent to the conclusion of a framework contract for the supply of goods conditional on the conclusion of another contract, usually for the provision of certain services to the supplier in return for payment, which the supplier would not otherwise require itself.

2. The buyer with significant market power **requires** the supplier to make a **payment or other performance** which is **unrelated** to the purchase or sale of agricultural or food products or to the provision of associated services or which is disproportionate to the value of the services provided (Article 4(2)(g) of the Act).

The point of the merits is to regulate cases where payment or other consideration is demanded from the buyer, in particular for services which have no immediate material connection with the purchase and sale of agricultural or food products. An example of this practice is the conduct of company A, which, as part of a good relationship, demands a contribution from its supplier, company B, for the overall presentation of products under the buyer's private label. Since this service has no direct material connection with the purchase and sale of the agricultural products supplied by company B, it cannot be claimed by the buyer.

3. A buyer with significant market power **threatens** or **takes retaliatory measures** against a supplier exercising its contractual or statutory rights (Article 4(2)(h) of the Act).

Retaliatory measures need to be assessed in the broader context of trade cooperation. The very word "retaliation" suggests that it should be a reaction by the buyer to the supplier's previous conduct. Typically, this may be the behaviour of company A which, as a buyer with significant market power, decides to substantially reduce its order volume in response to company B's cooperation with the Office. On the other hand, if the conduct in question is not conceived as retaliation, it will no longer meet the requirements of the offence.

4. A buyer with significant market power **unlawfully obtains, uses or discloses business secrets** of a supplier (Article 4(2)(i) of the Act).

Pursuant to Article 504 of the Civil Code, business secrets are competitively significant, identifiable, measurable and usually accessible in the relevant business community, which are related to the enterprise and whose owner ensures their confidentiality in an appropriate manner in his interest. An example of such an act would be where a buyer, in the course of a quality audit of a supplier, obtains information about the secret formula of a particular well-known product and subsequently creates a product under its private label with a similar formula. By selling it at a significantly lower price, they then drive the original supplier out of the market.

5. A buyer with significant market power shall **negotiate** or **apply** a price condition which results in the tax document not **containing the final price** for the purchase or sale of agricultural or food products or the provision of associated services after taking into account any negotiated discounts, except for pre-negotiated quantity discounts (Article 4(2)(j) of the Act).

The conduct in question generally affects contractual arrangements that would allow retroactive manipulation of the final price of goods or services. However, it may also involve the actual conduct of applying an additional discount by A, as a buyer with significant market power, to the supplier, company B. However, if the tax document does not contain the final price as a result of a pre-agreed quantity discount, an additional change in the price of the goods depending on the outcome of the mutual trade is in principle possible.

6. A buyer with significant market power **negotiates** or **applies a longer period for the payment** of the purchase price for the purchase or sale of agricultural or food products than is permitted by Article 3 b(1)(a) of the Act (Article 4(2)(k) of the Act).

An example of the fulfilment of the merits of unfair trading practices may be the conduct of a buyer who, although in contracts with suppliers has a due date of payment duly negotiated for a maximum of 30 days from the date of delivery of the invoice, consistently pays for the goods late, i.e. after the due date. Late payment by buyers is the most common unfair trading practice at European level.

7. A buyer with significant market power shall **negotiate** or **apply compensation** to the supplier in response to a **sanction** imposed by the supervisory body without the supplier having caused the violation of its obligation (Article 4(2)(l) of the Act).

This conduct can be illustrated by the example of a buyer, company Y, which was fined by the Czech Agriculture and Food Inspection Authority for improper storage of fresh food in a retail store. The food supplier, company Z, is not at fault for the offence and cannot therefore be called upon by the buyer to reimburse the sanction imposed. However, if the fine was imposed for failure to comply with the quality parameters of the product, which the supplier was contractually obliged to ensure, the supplier can be required to reimburse the fine imposed by way of recourse.

8. A buyer with significant market power or a person authorised by it shall **carry out an audit** or **other form of control** of the supplier, including requiring analyses of agricultural or food products at the supplier's expense (Article 4(2)(m) of the Act).

The merits do not intend to prohibit the mere negotiation of the possibility of an audit or other form of supervision of the supplier, but only its subsequent performance at the expense of the supplier. The aim here is not to exclude the possibility of the buyer auditing the supplier, but only to exclude auditing at the supplier's expense. Thus, if, for example, an audit is carried out by an auditing company at the expense of the retailer as a buyer by agreement of the parties, the conduct will not constitute an unfair trading practice vis-à-vis the supplier.

9. A buyer with significant market power shall **negotiate** or **apply** payment or other consideration **for deterioration in the quality or loss** of agricultural or food products not caused by an infringement of the supplier's obligation after it has taken possession of the agricultural or food products or the ownership of the agricultural or food products has passed to it (Article 4(2)(n) of the Act).

Significant Market Power Act prohibits unjustified and unreasonable transfer of economic risk to suppliers in situations where that risk is fairly incurred by buyers. Typically, this provision may be reflected, for example, in special warranty and liability for defects clauses in framework agreements (or, where appropriate, in terms and conditions) between the buyer and the supplier, from which an obligation to provide such performance may be inferred. The purpose of the provision is to reflect the fact that, once the product is no longer in the supplier's possession, it is no longer in the supplier's power to control the damage event, and thus the supplier cannot be required to contribute to the remedy of a negative consequence caused by the buyer's fault.

10. A buyer with significant market power shall **negotiate** or **claim** against the supplier **compensation** for the costs of investigating a **consumer complaint** concerning agricultural or food products without the supplier having committed misconduct (Article 4(2)(p) of the Act).

As an example, the following situation can be mentioned. A company A, a buyer with significant market power, and company B (the supplier) have a contractual clause imposing an absolute obligation on the supplier to pay the costs incurred by the buyer in relation to any consumer complaint. On the basis of this, the buyer will use costly legal services to respond to the consumer's complaint and will procure a report from an expert laboratory, which will then be reimbursed by the supplier.

11. A buyer with significant market power shall **negotiate** or **exercise** the right to **return** purchased agricultural or food products without paying for the unsold agricultural or food products or for their disposal (Article 4(2)(q) of the Act].

Under the current legislation, the right to return products can be negotiated, but this transfer of risk to the supplier must be fully compensated by the supplier. It is therefore not an unfair trading practice to negotiate or exercise a right of return for agricultural or food products if the return is linked to adequate payment by the buyer for the disposal or secondary use of the goods. Therefore, if, for example, a retail chain agrees with a supplier of bakery products to return such goods, it is essential that an adequate payment by the buyer to compensate for this transfer of risk is also agreed at the same time. In such case, the amount of the payment shall be determined taking into account the possibility of secondary use and the coverage of processing costs.

12. A buyer with significant market power **negotiates** or **applies** a payment or other consideration for the **placing on the market, storage, supply or delivery** of agricultural or food products (Article 4(2)(r) of the Act].

In particular, the merits regulate the so-called "facilitation fees", which are not actually matched by any consideration. However, there is no facilitation payment in a situation where a buyer with significant market power already provides the supplier with some real consideration for the payment. It is also necessary to distinguish between supply to the market and putting on sale. Supply to the market should be interpreted together with the concepts of storage and inclusion in the offer, i.e. in the context of situations where, for example, a food retailer displays goods on a shelf for a buyer to purchase. In contrast, placing on the market is a conglomerate of activities consisting, for example, of advertising the goods, marketing studies or plans.

13. A buyer with significant market power **negotiates** or **applies** payment or other consideration **for the construction or technological modification of premises for the sale** of agricultural or food products (Article 4(2)(s) of the Act).

According to some media indications, in the past, some retailers have, for example, demanded payments from suppliers for the remodelling of their own shops. The shops have thus been given a modern design and the buyer's assets have been valued. It is logical that if the buyer is upgrading its own property, it cannot honestly ask for a contribution from the supplier for these improvements.

14. A buyer with significant market power **provides a false indication** of the country or place of origin of the agricultural or food products or **falsely indicates** the country or place of origin of one or more ingredients of the agricultural or food products that make up more than 50% of that product or item (Article 4(2)(t) of the Act).

The unfair trading practice referred to in this subparagraph may be committed by a buyer with significant market power who fails to give a true indication of the country of origin of the goods in question at the time of sale and thereby harms (i) the supplier of the goods or (ii) other suppliers of the same goods. The sale of fruit by a buyer with significant market power who would claim to be Czech production, while the fruit sold would actually be grown in another country with lower production costs, which would in turn also entail a lower sales price, may serve as an illustrative example. As a result, suppliers of fruit produced in the Czech Republic could be harmed by such conduct, as they would in fact not be able to compete with a low selling price. Nor does the fact that the buyer committed an offence due to incorrect information from the supplier relieve him of liability for the offence.

15. A buyer with significant market power **requires** the supplier to pay all or at least part of the **costs of discounts granted** on agricultural or food products sold by the buyer as part of a promotion, unless the period and the expected quantity of products to be ordered at a discount have been specified before the promotion begins (Article 4(2)(u) of the Act).

This provision is linked to the content of the purchase action referred to in Article 3b(1)(d) of the Significant Market Power Act. The justification for the merits is to protect suppliers, who must agree to a specific action affecting their contractual rights and obligations and must also know when the action will take place, approximately how many goods will be taken and what the costs of the action will be. Only if all the details of the purchasing action have been agreed in good time can the supplier be required to pay the purchase price of the action, which is usually lower than the normal price. With regard to the indication of the expected quantity of products, it is worth noting that this should be an educated guess based on the buyer's objective experience with similar promotions. If the conditions for a purchasing event are not met, the buyer cannot require the supplier to bear the costs of the event.

16. A buyer with significant market power **makes** supply **conditional** on the **use of third-party services**, the conditions and price of which are set by the buyer (Article 4(2)(v) of the Act).

The merits seek to ensure the autonomy of the supplier's will in deciding whether to negotiate certain services. It concerns the situation where a third party, in the form of a service company, enters into the relationship between the supplier and the buyer. In order to be able to sell its goods to a buyer, the supplier is obliged to arrange for certain services for consideration from that third party, but which are not necessary for the performance of the business relation. It is thus a specific version of the tied services, which, however, is not provided by the buyer himself, but which is entrusted to a third party. If, without its involvement, a buyer refuses to cooperate with a supplier, it may engage in an unfair trading practice.

b) Practices from the Grey List (Forbidden Only Conditionally)

1. The buyer with significant market power **negotiates** or **applies** a payment or other service to cover, in whole or in part, **the costs of a discount** on agricultural or food products sold by the buyer in the context of promotion (Article 4(3)(a) of the Act).

This practice can be defined as a certain superstructure of the facts referred to in Article 4(2)(u) of the Significant Market Power Act. It follows from the Act that the buyer's conduct will be an offence under Article 4(3)(a) of the Act only if the promotion agreement is not specifically expressed in writing by the parties in advance, that is, in other words, the requirements under Article 3b of the Act are not met. As an example, the situation between company A (buyer with significant market power) and company B (supplier), which merely agreed orally that the costs of promotional events, including the mandatory elements of the event, are to be borne by the supplier. Such conduct will be considered unfair, as the buyer should have ensured that the promotion was properly negotiated. On the other hand, if all the promotion requirements are fulfilled in writing, such conduct cannot be regarded as prohibited.

2. A buyer with significant market power **negotiates** or **applies** a payment or other consideration for **advertising** of the supplier's agricultural or food products (Article 4(3)(b) of the Act].

Advertising is not a defined concept under the Significant Market Power Act. However, it is, in principle, a service for which a buyer with significant market power may charge for its performance. However, only on condition that such a service is agreed in advance in writing, i.e. there is a clear agreement between the parties, in particular, on its content and price. It can be characterised as a component or part of marketing aimed at increasing sales of goods. A tool for advertising can be used, among other things, by certain equipment in shops to promote products. If business partners whose relations are subject to the Significant Market Power Act regime agree or apply a payment for a service falling within the category described without having been agreed in writing, the conduct in question will have to be classified as an unfair trading practice, regardless of whether or not the form of advertising in question has mutual benefit.

3. A buyer with significant market power **negotiates** or **applies** a payment or other consideration **for staff engaged in the setting of premises** for the sale of agricultural or food products (Article 4(3)(c) of the Act).

Some types of goods may require special care when they are sold. Therefore, the Significant Market Power Act does not completely prohibit a buyer from requiring performance on behalf of staff who arrange for the accommodation of his sales premises. Here too, however, it is a condition of admissibility that the service must be clearly negotiated in writing before that service is provided. However, this supply by the supplier to the buyer is also covered by the other provisions of the Act, i.e. in particular it should be a supply which is proportionate and directly related to agricultural and food products.

6. Services Related to the Purchase and Sale of Agricultural and Food Products

Pursuant to Article 3b(1)(c) of the Significant Market Power Act, a **contract between a buyer with significant market power and a supplier**, the subject matter of which is the purchase, sale, processing or distribution of agricultural or food products, or the **receipt or provision of associated services**, or the intermediation of any of these activities, shall be in writing, it shall be concluded before commencement of the supply or processing of agricultural or food products or the receipt or provision of associated services, and shall also contain a **specification of the associated service, if any**, which is being **received or provided**, as to its **subject matter and scope, including the price** for such service or the manner of its determination, payment method, maturity **and cost estimation, and the basis** on which the buyer with significant market power has made such estimation.

According to the Act, services associated with the sale of agricultural and food products (hereinafter referred to as "**associated services**") are subject to relatively strict requirements, both in terms of their formal definition in a written contract and the actual nature of such services. These legal requirements are intended to ensure that both the supplier and the buyer receive and provide such services in a mutually beneficial manner.

The Significant Market Power Act does not contain a legal definition of related services. From the explanatory memorandum to the amendment to this Act implemented by Act No. 50/2016 Coll. and from the individual provisions of the Significant Market Power Act relating to services, it is possible to deduce both the **voluntariness** of negotiating and providing associated services and payments for them and the features determining the nature of these services and the prerequisites for their provision.

The explanatory memorandum to Act No. 50/2016 Coll. (parliamentary print 444/0, VII electoral period) states that: "**A service associated with the purchase or sale of food products means a service provided or received only between the buyer and the supplier which is closely associated with the sale or purchase of food products in question**, for example, payments for advertising provided by the buyer to the supplier from whom the buyer purchases the food products. The concept of service does not include the supply of electricity, water, heat, payment of rent and other services not associated with the actual supply of food products, but with the premises, its equipment, etc. (anything else may be sold in the particular premises, but without water, heat and light the premises could not be operated)".

It is clear from the above quotation that the associated service

- (i) shall be **directly associated with the specific sale** of agricultural or food products; and
- (ii) its receipt or provision can **only** take place **between a buyer or supplier** - but the nature of the provider or supplier in this case is determined by the fact that the service is directly associated with a particular sale of agricultural or food products.

Article 4(2)(b), (c) and (g) of the Act further implies

- (iii) **adequacy of the performance** for the provision of associated services;
- (iv) obligation of the buyer **not to discriminate against the supplier** in the negotiation or application of contractual terms and conditions for the provision of associated services.

The Significant Market Power Act does not explicitly state what services may be considered to have a **direct material connection** with the purchase or sale of agricultural or food products. Nor is the Directive entirely helpful in this area, as it does not specify such services. The Office considers that the associated service may be provided in both directions, i.e. by both the buyer and the supplier.

According to the Office, the **connection** with a specific business transaction shall be assessed **materially** - it is not decisive that the service is formally provided in connection with a specific transaction, but the real nature of the service provided shall also be taken into account, also in accordance with trade practices or the customary provision of the service within a particular sector.

According to the Office, it can be further deduced from the explanatory memorandum and the individual clauses on the provision of associated services that the **benefit** of the associated service in particular **for the supplier** was also a criterion for the legislator.

It is obvious that, in case of a service provider, **the service shall be one for which the provider is primarily authorised**, i.e. authorised to provide a specialised service.

Under current legislation, it is usually not always possible to infer the **necessity** of providing all the associated services for the purchase, sale, processing or distribution of agricultural or food products, even if the buyer or supplier formally decides to do so. According to the Office, a service that is not only necessary and required for a particular transaction, but also **needed**, may be considered an associated one.

A common feature of associated services with buying or selling is their

- (v) **necessity or need for.**

In the case in question, national and European **decision-making practice** on the **application of VAT** is also available as an **auxiliary criterion**. In the case of Commission versus Germany, regarding the reduced VAT rate, the Court of Justice of the European Union ("CJEU") came to the general conclusion that the objectives of EU legislation include the creation of a VAT charging system which is fully based on the principle of tax neutrality. According to that principle, similar services and goods shall not be treated differently in terms of VAT and shall bear the same tax burden in the territory of each Member State. It also prevents comparable goods and comparable economic operations which are consequently in a competitive relationship with other operations from being treated differently with regard to VAT. The CJEU concluded that the application of a different VAT rate was contrary to the declared principle of tax neutrality. On this basis, it is clear that careful consideration shall be given to which

services are closely associated to the purchase, sale, processing or distribution of agricultural or food products (similarly, according to the judgment of the Supreme Administrative Court of 26 September 2019, Ref. No. 8 Afs 265/2017-55).

Article 3b further develops the special provisions on black practices. Pursuant to Article 4(2)(g), it is an unfair trade practice **to require payment or other performance which is unrelated to the purchase or sale of agricultural or food products or to the provision of associated services or which is disproportionate to the value of the services provided.**

The Directive prohibits the request for payments from a supplier which are not related to the sale of products. The Directive does not specify the nature of such payments and/or the services for which the payments were made. As an example of sales-related payments, it mentions, for example, payments for promotion, marketing or inclusion of products in the offer; these are transactions that have been taken over into the definition of services and thus implemented in the Act at the same time. These should always be payments that are connected with the specific sale of agricultural or food products.

It could be concluded from this provision of the Directive that it includes payments for supplies or "services" which have no direct material connection with the purchase and sale of agricultural or food products, whether or not they are agreed in the contract or actually provided.

The Commission's answers do not address this issue in general terms and interpret the provision as referring to the request for payments for which no service has been provided. However, in specific cases, it has taken a negative approach to the classification of certain practices under that provision. These included (i) buyer-supplier financing (whereby the buyer pays the seller earlier than agreed, but for which it can take a share of the invoiced amount) or (ii) so-called "contact bonuses" (whereby the buyer receives a bonus from the supplier when it resells the supplier's goods to other customers). However, it should be emphasised that the Commission itself declares in its replies to the Member States' questions that the CJEU's opinion may differ.

The exceptions are so-called grey practices pursuant to the Directive or the Significant Market Power Act. **They are subject to clear and explicit prior agreement in the supply contract or in a subsequent agreement between the supplier and the buyer** and include, for example: promotion - this service is understood as an activity often associated with promotional or volume discounts to increase sales of a particular product, advertising - this service is understood as a sub-element or separate component of the broader concept of marketing. The essence of the advertising activity is to familiarize the customer with the product (it is not decisive whether it is a completely new product or an already established product), marketing - marketing service includes a complex and systematic strategy (for example, including marketing research or a marketing plan) including a combination of specific implementation measures (for example, radio advertising or placement in newspapers). The aim of marketing is to introduce a good to a specific range of customers and to increase its sales.

Requiring a payment or performance for the provision of various unrequested services or fictitious services by the buyer or a related entity may also be included under this provision as

a prohibited practice. Similarly, requiring payment or other performance where the consideration given is disproportionate to the real value of the performance provided may also be subject to this provision. It is therefore necessary that, when negotiating a variety of transactions, the buyer should also take into account the reasonableness of the performance required in relation to the real economic value of such performance.

It should be noted, in this respect, that the Office also assesses negatively the cases of so-called **advisory notifications**, i.e. cases of prior notification of the correct accounting by a third party designated by the customer for a fee. It should be noted, in this respect, that the Office also considers negatively the cases of so-called "advisory notifications", i.e. cases of prior notification of the correct accounting by a third party designated by the customer for a fee. Particularly since the previous trade practice between the parties did not involve any element of remuneration at all and the notification of the accounting within the business relationship was considered a fair and normal trade practice.

According to the Office, the so-called **logistics discount** is also not supported by the Act, since it is granted by the supplier for goods to which the ownership right and the risk of damage to the goods have passed to the buyer, usually by delivery to the buyer's central warehouse. Further charging (or, for that reason, demanding discounts on food products) for delivery from the central warehouse to the buyer's individual premises should already be on the buyer's account, since the goods are already in his possession.

The Office also recommends caution and restraint in the case of certain factually similar transactions. While a discount charged in the case of expiry of goods, including **advertising the sale of discounted goods due to the approaching expiry**, is similar in nature to a logistics discount and should, according to the Office, be entirely at the buyer's discretion, the so-called introductory discount in the case of new goods implicitly includes a benefit for the supplier in future sales of goods produced and supplied by the supplier and the Office's approach to this practice is not negative, which similarly applies to **accompanying marketing actions**, including so-called tastings at the sales premises.

In such cases, however, the circumstances of the particular case shall be carefully assessed, since pursuant to Article 4(2)(r) of the Act, it is also an unfair practice of a buyer to arrange or apply payment or other performance for the marketing of agricultural or food products, including arranging or applying payment or other performance for the storage of agricultural or food products, their inclusion in the offer or their delivery to the market.

According to the Office, the regime for services associated with the purchase and sale of agricultural or food products pursuant to the Significant Market Power Act should, generally, be as follows: (i) the voluntary nature of the negotiation and provision of the service, (ii) the direct link between the specific purchase or sale of agricultural or food products and the service provided, (iii) the benefit to the party paying for the service, (iv) the reasonableness of the price and cost of the associated service, (v) the prohibition of discrimination, and (vi) the necessity or need for the service. Failure to do so could bring such service into conflict with the requirements of the Significant Market Power Act.

7. Key Procedural Institutes of Unfair Trading Practices Investigation

The Office conducts ex officio supervision of compliance with the Significant Market Power Act. The purpose of such activity is to pursue the public interest by protecting the weaker party and, where appropriate, to settle trading relations between buyers and suppliers. Within the scope of its statutory competence, the Office assesses whether the conduct of a buyer with significant market power has violated the Significant Market Power Act both in the form of a failure to comply with the statutory requirements concerning the form and conditions of the contract between the buyer and the supplier (Article 3b of the Significant Market Power Act), as well as the application of unfair trading practices (Article 4 of the Significant Market Power Act).

Suppliers, but also buyers with significant market power, may experience the Office's supervisory activities in a wide range of situations. In addition to lodging a complaint to the supervisory authority in cases where the supplier believes that the conduct of a buyer with significant market power does not comply with the requirements of the Significant Market Power Act, it also includes, for example, the use of the Office's authority to conduct investigations to verify whether there is a reasonable suspicion of an infringement of the relevant legal provisions.

Complaint Submission

One of the important instruments of the Office in the exercise of its supervisory powers is the possibility for natural person or legal entity to submit complaints to this administrative authority indicating infringements of the Significant Market Power Act. It is based on the logical assumption that it is not possible for any administrative authority to become aware of all infringements of the relevant legislation that it is charged with supervising.

These are situations where such entities have to face a buyer with significant market power which conditions the supply of its agricultural and food products or the provision of associated services in a way prohibited by the Significant Market Power Act (Article 4 of the Significant Market Power Act). Moreover, in some cases, the form and content of the contract between the trading entities may not be observed (Article 3b of the Significant Market Power Act).

Any natural person or legal entity may notify the Office of facts indicating an infringement of the Significant Market Power Act preferably in writing by sending a letter in physical form to the address of the headquarters of the Office, i.e. třída Kpt. Jaroše 7, 604 55 Brno, Czech Republic, electronically to the data box with the ID fs2aa2t, by fax to + 420 542 167 112, by e-mail to the address: posta@uohs.cz or in person at the premises of the Office, whereby a written report will be made by the authorised official.

The submission of a complaint is not subject to any mandatory form, except for the minimum requirements for submission according to the Administrative Procedure Code. The complaint must therefore clearly indicate who is submitting it (in case of a subsequent request for additional information), what the complaint concerns, what is proposed (for example, an investigation of the matter) and it should also contain supporting documents proving the allegations made by the complainant. Each complaint shall be reviewed and the information

obtained shall be handled by the Office in a manner that guarantees its protection pursuant to the relevant legislation. The identity of the complainant may be kept confidential in accordance with the procedure set out below. The Office also deals with anonymous complaints, but in such cases the complainant cannot be informed of the status of the complaint and therefore cannot be asked for additional information. The submission of a complaint concerning a breach of the Significant Market Power Act is free of charge.

Obligation to Provide Complete and Correct Information

The Office's power to request complete, correct and truthful information and documentation from all entities is an essential power that can lead to clarification of the submission. The law here establishes an obligation for both suppliers and buyers with significant market power to provide the Office with cooperation for the purposes of its authorisation, both during the preliminary inspection and during the infringement proceedings themselves. Within the framework of these investigative powers (Article 7(1) of the Significant Market Power Act), the Office applies selected provisions of Act No. 143/2001 Coll., on the Protection of Competition and on Amendments to Certain Acts (hereinafter referred to as the "**the Competition Act**"), according to which anyone who provides the Office with documents and information, including business books, other business records or other records that may be relevant for the clarification of the subject matter of the proceedings, is obliged to provide complete, correct and truthful business records upon written request of the Office within a specified period of time.

If a legal entity or natural person fails to comply with this request and does not provide the documents requested by the Office, it may thereby commit an offence (Article 8(2)(b) of the Significant Market Power Act), or, in case of failure to provide the necessary cooperation during the Office's inspection, a disciplinary fine may be imposed (Article 10(1), (2) of the Significant Market Power Act), and even repeatedly.

Although the Significant Market Power Act entitles the Office to impose rather significant sanctions in case of non-compliance with these obligations, the threat of retaliation by a buyer with significant market power may be a more than actual reason for the supplier to distort the provided information or to withhold a substantial part of it, despite the fact that they are often being abused by buyers with significant market power. Therefore, the Office allows suppliers who provide confidential information to use the so-called "concealment of identity".

Identity Concealment

This involves the protection of the legitimate interests of the supplier or complainant who provides the Office with information and documents of a confidential and sensitive nature. Keeping their identities confidential reduces the "fear factor" and eliminates the lack of protection of the rights of these persons, which in turn leads to more effective detection and proof of illegal conduct by buyers with significant market power. This right can be used not only by the complainant but also by the person approached by the Office under its investigative powers, both in the context of the preliminary investigation and in the course of the administrative proceedings for an offence.

The basic presumptions for the application of the right to identity concealment are set out in Article 9(2) of the Significant Market Power Act.

- i. A person who provides the Office with confidential information and documents regarding the offence (hereinafter referred to as "confidential information") shall have the right to keep his/her identity confidential in relation to such documents before, after the initiation of the proceedings and after the conclusion of the proceedings.

The legal prerequisite for exercising this right is the provision of confidential information on the offence. Therefore, the right to identity concealment cannot be applied in the context of the provision of any information, but only in the context of the provision of "confidential information". This concept is not defined any further by the Significant Market Power Act. Nevertheless, in general, it may be stated that such information may at the same time constitute a business secret pursuant to of Article 504 of the Civil Code.

- ii. Without concealment of the identity of the persons providing the confidential information, their legitimate interests could be compromised or harmed.

Suppliers providing confidential information to the Office are usually in the position of a weaker contractual party, which may be subject to various forms of pressure in the supplier-buyer relationship. Therefore, the identity concealment ensures them a higher level of protection of their legitimate interests against possible retaliation from a supplier with significant market power.

- iii. Concealment of identity shall be requested by the person providing the confidential information at the same time as providing the confidential information.

The right of identity concealment can only be applied at the request of the supplier itself. The request for concealment of identity shall apply only to the relevant documents and information received by the Office from the person concerned and not to documents or information obtained from any other source.

- iv. The request for concealment of identity must be justified and shall be excluded from the access to the file.

The law presumes that if the identity of the supplier is not concealed, the supplier's legitimate interests could be jeopardized or harmed. Since the concealment of the identity of the supplier restricts the rights of a buyer with significant market power, the request must be properly justified. The reasons or circumstances demonstrating how the legitimate interests of the supplier concerned could be jeopardised or harmed without confidentiality shall be justified.

If the Office grants the request for concealment of identity, it shall notify the person concerned by a resolution. The identity of such a person shall also be kept concealed in the notices and communications sent to the person by the Office in connection with the disclosure of confidential information. Documents and information provided by such person to the Office

will be excluded from the access to the file until the statement of objections is issued. Such documents will be made available to persons with access to the file only after the statement of objections, and only in a form that does not compromise the purpose of the concealment of identity and the protection of business secrets.

The identity of the accused (i.e. in particular the buyer with significant market power who was notified of the initiation of the infringement proceedings) cannot be concealed.

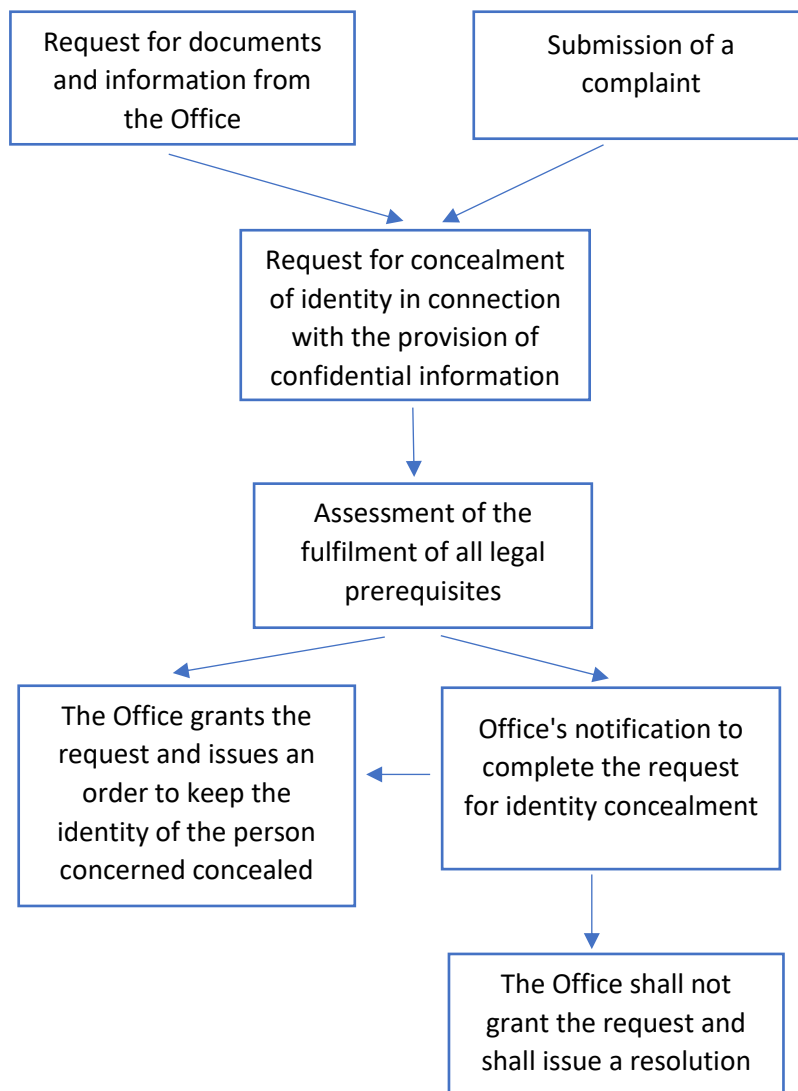


Figure 17 Office's Procedure for Exercising the Right to Concealment of Identity

Office's Procedure for Exercising the Right to Concealment of Identity

During the preliminary investigation or infringement proceedings conducted in relation to a possible infringement of the Significant Market Power Act, the Office invites suppliers to provide documents and information and at the same time informs them of the right to keep

their identity concealed (pursuant to Article 9(2) of the Significant Market Power Act). Should the supplier request concealment of identity in relation to the documents and information provided, the Office shall first of all assess the fulfilment of all the above-mentioned statutory prerequisites. In case of insufficient justification of the request, the Office shall invite the supplier to supplement its request in order to make clear how its specific legitimate interests may be jeopardised or harmed.

Should the supplier meet all the above-mentioned requirements for the exercise of the right to concealment of identity in its application, the Office shall proceed to the actual procedural assurance of the confidentiality of the identity of the supplier. First of all, the notices and communications sent by the Office to the supplier concerned, as well as its request for concealment of identity, shall be permanently excluded from access to the relevant file. Therefore, in practice, the relevant documents that are subject to the identity concealment in the administrative file will be made inaccessible with an indication that they are excluded from inspection of the file due to the identity concealment of the supplier.

Only after issuing the statement of objections shall the Office allow persons entitled with access to the file to see the documents and information provided by the supplier who has been concealed, but only in a form that does not compromise the purpose of concealment of the supplier's identity. Such a request shall be made by removing from the relevant documents any information enabling the identification of the supplier concerned.

Business Secret

Simultaneously with the use of the institute of identity concealment, but also completely independently from it, the Office also allows entities providing documents and information to request the protection of their business secrets within the meaning of **Article 504 of Act No. 89/2012 Coll., the Civil Code**. For the purpose of defining a business secret, the Civil Code uses six features which must be satisfied cumulatively. These are competitively significant, identifiable, assessable and in the relevant business community normally unavailable facts relating to the business which the owner ensures in its interest to keep adequately confidential.

- I. First and foremost, it concerns competitively important facts (information that brings a certain competitive advantage over other entities on the market), disclosure of which could improve the position of competitors to the detriment of the entity that keeps the information secret. The significance for the market environment is assessed according to the expected impact that the disclosure of the information would have in the market.
- II. Another requirement is the identification (identifiability) of competitively relevant facts. Only those facts which can be captured or described in a perceptible form (e.g. in writing) are capable to constitute a business secret.
- III. Furthermore, it is necessary that the facts concerned are measurable, i.e. have a monetary or otherwise economically usable value.

- IV. These facts shall be matters which are not generally available among potential or actual competitors. Thus, business secrets cannot be publicly available information, for example, documents contained in the collection of documents, other information from public registers, the land register, compulsory registers etc.
- V. The fifth defining characteristic of a business secret is its connection to the business. In this case, it is not important what facts the secret relates to, but that the fact is related to the business. It does not have to be part of an organised set of assets, but may relate to production, sales, distribution, marketing, logistics, conduct, corporate strategy etc.
- VI. The last feature of a business secret is the need of ensuring its secrecy. This definition implies that if an entrepreneur wants to protect its business secrets, then it must take an active role in protecting them.

Part of the Office's request for the provision of documents and information includes an instruction in which the addressed legal entity or natural person are informed of the possibility to indicate their business, banking or similar secrets protected by law in the provided documents. Such entities are also advised of the obligation to submit to the Office, in addition to the documents containing the relevant secrets, documents from which the secrets have been removed, or to make a sufficiently detailed extract from such documents which do not contain the secret information. If they fail to do so, the Office shall consider that the submitted documents do not contain business, banking or other similar secrets protected by law.

Regarding these facts, all persons in an employment or other relationship with the Office are obliged to maintain confidentiality, even after the termination of this relationship (Article 24 of the Competition Act).

In practice, only documents from which business, banking or similar secrecy has been removed are made available to persons entitled to inspect the administrative file. Documents containing such secrets are permanently inaccessible to such persons. If a buyer with significant market power illegally obtains, uses or discloses such business secrets of the supplier, it would violate the Significant Market Power Act (Article 4(1), (2)(i)).

In addition to the above-mentioned concepts of concealment of identity and business secrecy, the Office also processes personal data in its files, in accordance with Regulation (EU) No 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, hereinafter referred to as "GDPR").

Alternative Solution of Certain Issues

Within the supervision of compliance with the Significant Market Power Act, the Office is entitled to conduct an investigation prior to the initiation of administrative proceedings (Article 5(1) of the Act) in order to verify whether there is a reasonable suspicion of an infringement of the Act ("preliminary investigation"). Should the facts found in the preliminary

investigation justify the suspicion of an infringement of the Significant Market Power Act, the Office shall preliminarily evaluate the level of gravity of the conduct in question, its nature and the manner in which it was committed. In such cases, the legislation envisages the initiation of proceedings, the gathering of necessary evidence and the notification of whether an offence has been committed and the possible imposition of a fine. The preliminary investigation will thus normally evolve into an administrative offence proceeding if such a suspicion exists. There is, however, a possibility of some derogation from the normal practice of conducting the proceedings, in the form of so-called prioritisation and possibly also so-called commitments.

Remedy of Infringement Without Initiating Proceedings

Even if an infringement of the Significant Market Power Act is found, the Office is entitled not to initiate an administrative proceeding and, after a preliminary investigation, to terminate the case by issuing a resolution. However, the prerequisite for such a procedure by the Office are facts indicating that, in view of the significance and extent of the infringement or threat to the protected interest affected by the conduct, the manner of its commission, its effect, the circumstances under which the conduct was committed, or the suspect's behaviour after the conduct, it is obvious that the objective that could have been achieved by conducting the infringement proceedings has been or can be achieved in another way (Article 9(3) of the Act).

This may be the case where there has not yet been a violation of fairness in the buyer-supplier relationship, or where there has been a violation but to a very limited extent. In that case, there is no need to carry out extensive investigations and the entity in question can take measures leading to the prompt elimination of possible infringement. In such cases, the Office may apply this alternative procedure and not initiate the administrative proceedings.

Therefore, if the Office concludes on the basis of a preliminary investigation that the case is suitable for the application of the above-mentioned procedure, it will generally inform the suspect of the conduct in which it sees an infringement of the Significant Market Power Act and may, at the same time, invite the suspect to submit a proposal for measures leading to the elimination of the infringement. If the Office finds the proposed measures sufficient, it may refrain from initiating proceedings and suspend the case by resolution.

Remedy of the Infringement After Initiation of the Proceedings

Should the investigation have already reached the stage of the administrative proceedings, instead of issuing a decision on the offence and imposing an administrative penalty, the Office may apply the procedure of adopting a decision on commitments and terminating the administrative proceedings.

This is usually a situation where the Office has already delivered a written notification to the party to the proceedings indicating the basic facts of the case, their legal assessment and references to the main evidence contained in the file ("statement of objections"). The party to the proceedings, which has received this statement of objections, may then submit to the Office within 15 days a commitments proposal of such nature and intensity that their

acceptance will be able to justify the termination of the ongoing proceedings and, above all, to remedy effectively the relations affected by the infringement of the Significant Market Power Act. The party to the proceedings is therefore given a realistic opportunity to participate on its own initiative in remedying the infringement and to terminate the proceedings before the Office issues a sanctioning decision.

The Office will evaluate the proposal submitted and assess whether the proposed commitments (a) are capable of remedying the infringement, (b) the party's abuse of significant market power has not been qualified as serious, (c) are sufficient in terms of their ability to remedy the infringement, and (d) whether the party has not acted in a manner that is subject to reproach by the Office since submission of the proposal for such commitments until the Office's decision.

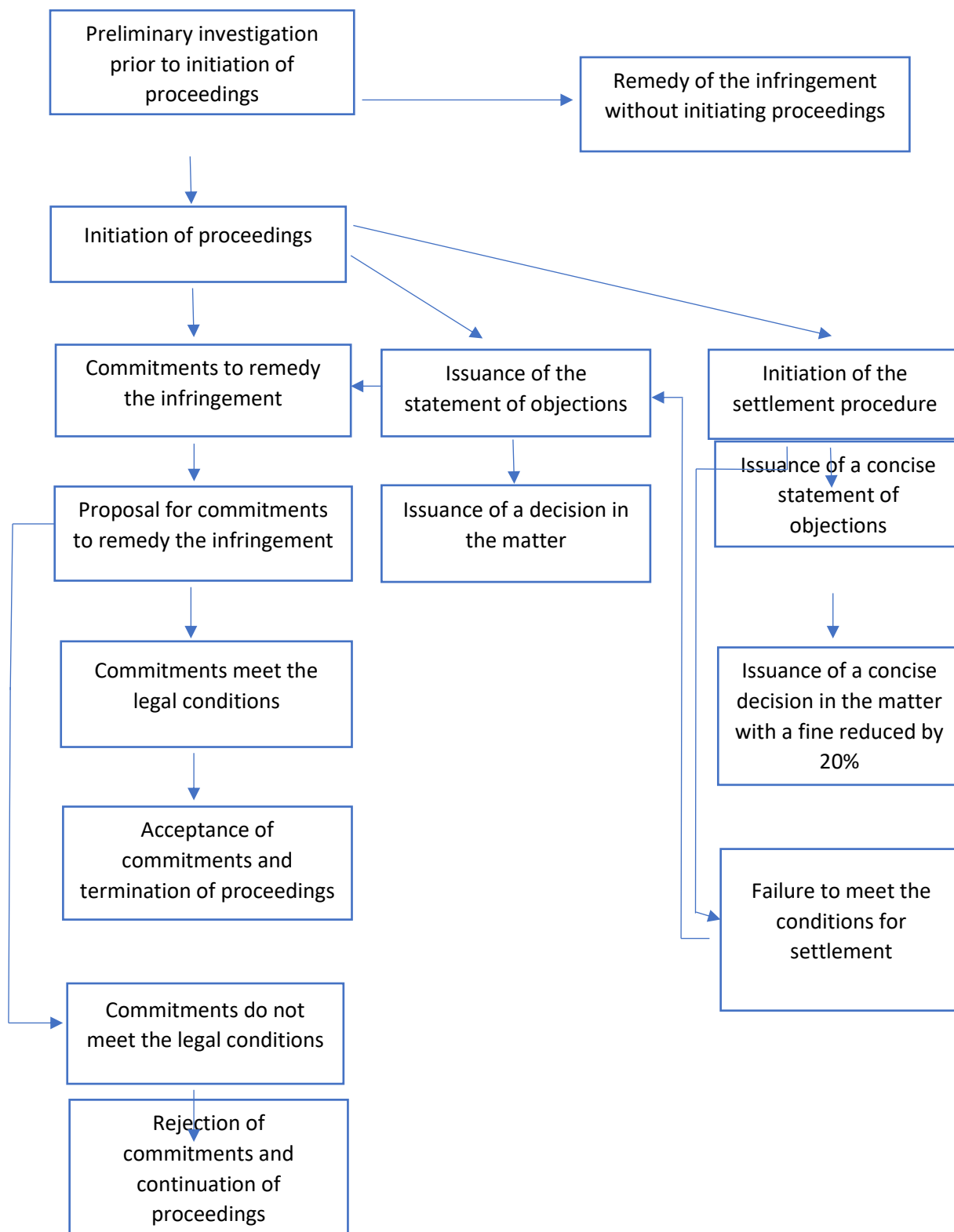


Figure 18 Alternative Procedures of the Office

If all of the above conditions are met simultaneously, the Office will issue a decision on termination of the proceedings instead of a decision declaring an infringement and prohibiting such conduct in the future. In such a decision, the Office may, in addition to accepting and imposing compliance with the commitments proposed by the party to the proceedings, also impose conditions and obligations necessary to ensure compliance with those commitments. If the Office does not receive a proposal for commitments within the time limit set or finds them insufficient, it shall communicate these facts in writing to the party and continue the proceedings (Article 6(2) and (3) of the Act).

Where proceedings have been terminated on the basis of commitments accepted, the Office may reinitiate the proceedings if the conditions decisive for the acceptance of the proposed commitments change, the investigated entity continues to act contrary to the proposed commitments, or the proposed commitments were accepted on the basis of false documents and information. The Office also continuously monitors the fulfilment of the commitments, the compliance with which was made a condition for the termination of the administrative proceedings. By failing to comply with the commitments, a party to the proceedings may commit an offence pursuant to Article 8(1)(b) of the Significant Market Power Act.

Settlement

Should the Office find a buyer with significant market power to have committed an offence pursuant to Article 8(1) of the Significant Market Power Act, the buyer pleads commitment of the offence and the Office finds its punishment to be sufficient in view of the nature and gravity of the offence, it may reduce the fine of the buyer with significant market power by 20%, which it informed the buyer of by means of a statement of objections (Article 8(6) of the Act).

The purpose of this provision is to achieve a correction of supplier-buyer relations in the shortest possible time and to benefit from procedural savings in the form of not using the suspect's appeals against the first-instance decision of the Office. If the suspect pleads commitment of the offence and does not dispute the Office's fact findings or its legal assessment, it can be assumed that it will not appeal the Office's decision. As a result, the proceedings in question may be shortened and the Office's decision will become final sooner. In view of these procedural savings, it is then appropriate to reduce the fine imposed on the party to the proceedings.

The initiation of a settlement procedure in a particular case is always at the discretion of the Office. In its consideration of whether to apply this procedure or not, the Office shall take into account, in addition to the commitment plea, the nature and gravity of the conduct of the suspect, the status and development of the proceedings at the given moment, the number of parties to the proceedings and the expected level of the sanction, including an assessment of whether, even after a reduction, the sanction will be sufficient compared to the nature and gravity of the offence.

The entity suspected of committing an offence does not need to actively apply for a settlement, if the relevant conditions are met, the Office will decide in this way even without an application. In practice, the Office usually seeks the suspect's interest in entering into the

settlement procedure before making a decision on the merits. Following the initiation of the settlement procedure, the Office usually holds an oral hearing with the suspect, at which it summarises the circumstances of the case, the main evidence, its legal assessment and the expected amount of the fine it intends to impose on the suspect. At the conclusion of the hearing, the Office shall invite the party to the proceedings to declare whether it wishes to continue the settlement procedure. The notification of the interest to continue the settlement procedure shall be made by the party to the proceedings within the time limit set by the Office and shall indicate that, even after having been informed of the factual and legal classification of his conduct and the expected amount of the fine, it is still interested in concluding the settlement procedure. Provided that the notification contains all the necessary aspects and is received by the Office within the time limit set, the Office will issue a concise decision on the merits. Otherwise, the settlement procedure will be terminated and the proceedings will continue in the standard way.

Remedy

The decision on acceptance of commitments by a party to the proceedings to remedy an infringement (Article 6(2) and (3) of the Act) shall be distinguished from the imposition of remedies pursuant to Article 6a of the Significant Market Power Act. In case of acceptance of commitments, a voluntary initiative of the party to the proceedings is necessary. In contrast, remedies may be imposed by the Office in a directive manner, in addition to a sanctioning decision by the Office pursuant to Article 6(1) of the Significant Market Power Act.

The Office may impose such a remedy only in the event of an infringement of the prohibition referred to in Article 4 of the Significant Market Power Act. The purpose of the remedy is to remedy the infringement in a manner identified by the Office and for the implementation of which the Office sets a reasonable time limit for the party to the proceedings, which should correspond to its real possibility to actually implement the remedy. For this reason, this time limit may vary from case to case.

The remedy is therefore a supplementary tool which the Office may use if it concludes in the administrative proceedings that the mere finding of an infringement together with its prohibition in the future, or the imposition of an administrative punishment in the form of a fine, do not constitute sufficient measures to achieve the objective protected by the Significant Market Power Act.

The imposition of remedies is part of the operative part of the decision in the matter of the infringement of the Significant Market Power Act. Its infringement may be sanctioned separately by means of a fine for an offence pursuant to Article 8(1)(c) of the Significant Market Power Act.