

LEGAL REGULATIONS CONCERNING UNFAIR COMPETITION ACTS IN POLAND – DISCUSSION IN THE LEGAL CONTEXT

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Annotation. Unfair competition act is a deed contrary to law or good practice if it jeopardizes or violates interests of another entrepreneur or client. Unfair competition acts include misleading designation of an enterprise, false or deceptive designation of geographical origin of goods or services, infringement of an enterprise's confidential information, incitement to termination or non-performance of an agreement, imitation of products, slandering or unfair touting, impeding access to the market, bribing a person performing a public function, etc. Deed of unfair competition is defined in special laws. There is special Law of 16.04.1993 on Combating Unfair Competition in Poland, which regulates unfair competition sphere. Several aspects according this law describe competition violation. First, there must be a connection between violations and the relations of current market. For example, non-payment of taxes or duties by an entrepreneur, which enables the entrepreneur to offer lower prices, but not running a business without a concession because this would not be a sufficient prerequisite to regard this act as unfair competition. Second, the acts that infringe good practice include those that collide with principles of ethics, gathered in so-called professional ethics codes, providing models of certain desirable conduct, suitable for representatives of particular occupations. Morality is not a rule of law, but courts must follow good practise and moral standards. Third, unfair competition interests are interpreted through the economic interest. The concept of economic interest is difficult to describe, because it relates with market participants certain impact and this effect may be varying intensity and in different area. Thus, to define the consequences of threats of another entrepreneur or client is very difficult, because it is difficult to specify the threats. Thus, the Polish legislator does not provide an exhaustive list of sphere there the unfair competition is possible in the law of 16.04.1993 on Combating Unfair Competition. Such a legislator's position is right, because it is impossible to define economic needs in dynamically changing market. There are defined the general terms and conditions which define unfair competition in the law of 16.04.1993 on Combating Unfair Competition. One of these is bribery. Bribery jeopardizes other entrepreneur's or client's interests and gives competition advantage to individuals which participated in bribery. According the fact that it is difficult to define the concept of unfair competition; the suggestion is to relate *inter alia* unfair competition with good practice and moral standards.

Key words: unfair competition, legal regulation, economic interest, bribery

Introduction

In accordance with Art. 3 of the Law of 16.04.1993 on Combating Unfair Competition¹, an unfair competition act is a deed contrary to law or good practice if it jeopardizes or violates interests of another entrepreneur or client. Unfair competition acts are in particular: misleading designation of an enterprise, false or deceptive designation of geographical origin of goods or services, infringement of an enterprise's confidential information, incitement to termination or non-performance of an agreement, imitation of products, slandering or unfair touting, impeding access to the market, bribing a person performing a public function, as well as unfair or prohibited advertisement, and organization of a pyramid sale system (Nowińska E., Vall M. 2001).

The object – the legal regulation of unfair competition in Poland.

The aim – to make the analysis of the legal regulation of unfair competition in Poland.

The objectives:

- to discuss the conception of the unfair competition;
- to analyze the inherent characteristics of legal regulation of unfair competition in Poland;
- To look into the problems of making and implementing of legal regulation of unfair competition in practice.

The research methods – the generalization of the scientific literature analysis, systematic and comparative analysis, the analysis of graphical, court orders and legislation, logic – analytical method.

The concept and characteristics of the unfair competition in Poland

An unfair competition act is committed when the following prerequisites occur together: an act or

1. I.e. Journal of Laws of 2003, No. 153, item 1503 as amended.

omission is connected with economic activity, is contrary to law or good practice, and jeopardizes or violates interests of another entrepreneur or client.

Firstly, unlawful acts include those which are contrary to norms contained in the Law on Combating Unfair Competition and when infringement of legal rules, also other than those enumerated in the Law, gives a competitive advantage to the perpetrator, jeopardizing or violating interests of another entrepreneur or client. Therefore, there must be a connection between infringement of norms and the current market relations, in order to talk about unfair competition. Therefore, an unfair competition act would be, for example, non-payment of taxes or duties by an entrepreneur, which enables the entrepreneur to offer lower prices, but not running a business without a concession because this would not be a sufficient prerequisite to regard this act as unfair competition.

Secondly, the acts which infringe good practice include those which collide with principles of ethics, gathered in so-called professional ethics codes, providing models of certain desirable conduct, suitable for representatives of particular occupations (Tadeusiak M. 1993). It is noteworthy that these norms differ among various professions and are connected with the character of particular occupations. Moreover, this category includes also acts which violate moral standards grounded in norms of conduct in economic exchange. Therefore, any act and omission infringing moral and ethical norms, not aimed at fair competition but occurring only in economic exchange, can constitute an act of unfair competition. Good practices are not legal norms but standards of conduct, similarly as principles of social interaction. Good practices are moral norms and standards applied in economic activity. Guidelines how to define the notion of good practice should be searched primarily in the right attitude of entrepreneurs. Most importantly, this must be the attitude of honesty. It follows that the notion of good practice has not been precisely defined anywhere, which may lead to some practical difficulties. Therefore, the law enforcement bodies, that is courts, are responsible for creating the standards of adjudication concerning infringement of good practice. Each general clause refers to a judge's own assessment and his or her axiological sense, determined by objective and subjective factors, which should be reflected in the contents of a judicial decision.

Thirdly, there must be a prerequisite of infringement or a threat to an interest of another entrepreneur or client. The notion of interest should be interpreted as broadly understood economic interest. Whereas an infringement is easily determined because it entails interference in another subject's interest, the condition of a threat is difficult to define, because it pertains to effects of a certain act or omission. These effects are not easy to describe unambiguously, because they can occur in different dimensions and with various intensity. Hence, precise definition of the consequences of threats to another entrepreneur's or client's interests is highly complicated due to the difficulty in specifying the threats themselves. Furthermore, such infringements or threats can be caused by an entrepreneur or other subject specified in law, if he or she performs acts which are prohibited in Art. 3 section 2 in conjunction with Art. 5-17a-17d of the Law on Combating Unfair Competition. Thus, the legislator has not restricted the list of unfair competition acts only to those enumerated in the Law, owing to the dynamically changing needs of economic exchange, because such a solution would lead to considerable simplifications and misunderstandings.

De lege ferenda, the notion of unfair competition should be clarified in the Polish legislation in order to eliminate any doubts about legal classification of deeds which are contrary to law or good practice if they jeopardize or violate other entrepreneur's or client's interest.

Legal liability of unfair competition

There is civil and penal liability of unfair competition in Poland by the Law of 16.04.1993 on Combating Unfair Competition. Then there is civil liability an entrepreneur, whose interest has been violated or threatened, due to an act of unfair competition, may request the entrepreneur who committed an act of unfair competition, to: cease prohibited activities; remove the effects of those activities; make a certain public declaration; compensate a loss caused; release unlawfully gained profits; pay an appropriate amount of money for agreed public purposes - if an act of unfair competition was caused by fault. It should be noted that the above demands (except for some cases) may also be submitted by an organisation, whose statutory purpose is protection of entrepreneurs' interests. The burden of proof of the veracity of marking or information placed on pro-

ducts or their packing or of statements contained in the advertising shall fall upon the person accused of the act of unfair competition connected with misleading. In connection with this the requests pertaining the acts of unfair competition shall expire with the lapse of three years. The course of the expiry shall be initiated separately for each infringement.

The Law of 16.04.1993 on Combating Unfair Competition introduces criminal liability for committing some of acts of unfair competition provided for in this act. Every person, who contrary to her obligation towards the entrepreneur discloses to another person or uses in her own economic activity information which is a business secrecy, shall be liable to the fine, probation or imprisonment up to 2 years, provided it is to the significant detriment of the entrepreneur. The same sanctions shall apply to the person, who having acquired illegally the business secrecy, discloses it to another person or uses in her own economic activity. Every person, who by way of technical means of reproduction shall copy external image of a product or releases such product for free circulation creating the possibility to mislead customers as to the producer or product identity, thus significantly damaging the entrepreneur, shall be liable to the fine, custody or imprisonment up to 2 years. Whoever organises a system of pyramid sales or manages such a system is subject to imprisonment for between 6 months and 8 years. So, committing one of these offences (or misconducts) described in this act is made subject to a penalty or a fine, restriction of freedom and even imprisonment (up to eight years). Prosecution of offences (or misconducts) provided for in the Act on unfair competition is initiated upon a motion (request) of a harmed person, and in the case of misdemeanors – upon a request of the injured.

Illegal act influence to unfair competition

Art. 3 section 1 has a character of a general clause and unfair competition acts are enumerated in Art. 3 section 2 in conjunction with Art. 5-17a-17d of the Law on Combating Unfair Competition. The general clause fulfils both the corrective function, because it refuses protection when there are no grounds for qualifying a given deed as an unfair competition act, and the supplementary function which provides a possibility to classify as unfair competition acts also other deeds apart from the ones enumerated in the Law.

Art. 3 section 2 of the Law on Combating Unfair Competition mentions bribery of a person performing a public function as one of unfair competition acts (Kępiński M., J. Szwaja 2010). In accordance with the Law of 06.06.1997 – the Criminal Code², a person performing a public function is: a public official, a member of local government bodies, a person employed in a organisational unit dealing with public funds, unless he or she only renders services, as well other person whose rights and duties are specified or endorsed by a legal act or an international agreement binding in Poland (Art. 115 § 19 of the Criminal Code). In order to classify a deed as an unfair competition act, three prerequisites must be fulfilled together. Firstly, an act or omission must be undertaken in the course of economic activity, secondly the act is contrary to law or good practice, thirdly an act or omission jeopardizes or violates interests of another entrepreneur or client. (Dzienis P, Filipowski W. 2001). Unlawful acts include those which violate provisions of the Law on Combating Unfair Competition, do not prevent and do not combat unfair competition acts (Kurczewski J., Łaciak B. 2000). An act of good practice conforms to generally accepted norms and standards of conducts. An act infringes and jeopardizes an entrepreneur's interests if it violates law and gives the perpetrator a competitive advantage on the market (Podrecki P. 1994). Hence, for example, bribing of a customs official by an entrepreneur or a person acting on behalf of the entrepreneur for the purpose of gaining exemption from customs duty is an unfair competition act.

An unfair competition act in the form of bribing of a person performing a public function by 1/ an entrepreneur, 2/ a person authorized to represent the entrepreneur, to take decisions on his/her behalf or to exercise supervision over him/her, 3/ a person acting for the entrepreneur with consent of the person referred to in point 2 – is specified by Art. 15a of the Law of Combating Unfair Competition (Czachórski W. 2009). In accordance with the above, in order to qualify an act as bribery it has to be self-seeking and aimed at obtaining a favour for the entrepreneur. A perpetrator of a crime specified in Art. 15 a point 2 can be a person authorized to represent the entrepreneur or to take decisions on his/her behalf, as well as a person acting for the entrepreneur and authorized to exercise supervision over him/

² Journal of Laws of 1997, No. 88, item 553, as amended.

her. This category certainly includes presidents of the board, proxies or heads of state enterprises. On the other hand, there are doubts whether to include into this category such people as members of management boards or supervisory boards, because it is difficult to regard deeds of these people, performed on their own initiative and without consent of proper bodies, as unfair competition acts. A perpetrator of the act specified in Art. 15 a point 3 can be a person acting with the consent of a person referred to in point 2. It refers to the consent for committing of a crime and expressing it in a conscious way.

Therefore, a deed of a person who intends to be employed by an entrepreneur and undertakes to intervene, pointing to his/her familiarity with a customs officer and bribing the officer on his/her own initiative and without the entrepreneur's knowledge, constitutes a crime under Art. 229 of the Criminal Code, but is not an unfair competition act (Salwa Z. 2003). On the other hand, if this private financial gain is handed in by the president of the management board of a company or the head of a state-owned enterprise, their conduct will constitute an unfair competition act, because these people are authorized to act for the entrepreneur and are entitled to represent him/her.

Furthermore, we can consider a situation when bribery of a person performing a public function – a customs officer, results from deeds of a person who incites another person working for the entrepreneur to non-performance or improper performance of the employee's duties (Musztalski W. 2008). In this particular case, it is failure to pay customs duty. The conduct of the employed person fulfils the criteria from Art. 299 of the Criminal Code and from Art. 15 a of the Law. On the other hand, the inciting person fulfils the criteria from Art. 12 section 1 of the Law, according to which an unfair competition act is to incite a person who works for the entrepreneur, on the basis of employment contract or other legal relationship, to non-performance or improper performance of the employee's duties or other contractual responsibilities, in order to obtain gains for oneself or for other people or to the detriment of the entrepreneur (Bieńka G. 2011). An unfair competition act violates law, good practice, infringes the interest of an entrepreneur or a client, which includes bribery of a public official (Radwański Z. 2009). Hence, a deed of a person who incites a customs officer to commit a crime is an unfair competition act because it leads to infringement of not only Art. 12

but also Art. 3 and Art. 15 a of the discussed Law. As a result, bribery of a public officer is committed.

Criminal responsibility of a person performing a public function is specified in Art. 229 of the Criminal Code jointly in the form of imprisonment from 6 months to 12 years, the punishment of liberty restriction and a fine (Tarchalski K. 2000, M. Surkont 2000). This article pertains also to providing or promising to provide a financial or personal gain to a person who fulfils a public function in a foreign state or an international organization, in connection with fulfilment of this function. However, criminal responsibility is excluded in a situation when the perpetrator informs law enforcement bodies about acceptance or a promise to accept a financial gain by a public official. It should be emphasized that this crime is committed irrespective of the fact whether there are positive effects from the perpetrator's perspective or even whether the public officer accepts the gain offered.

Conclusions

1. In wide point of view of Poland law, the unfair competition is revealed through the three criteria.
2. Violation of the rules is associated with the market, i. e. unlawful acts that violate other laws gives an advantage to other participants of market. Polish law describes one of such unlawful act as bribery.
3. At the same time violations of unfair competition is also violation of good practice and moral standards. According to this, the suggestion is to relate unfair competition with good practice and moral standards.
4. Unfair competition is related with economical interest. However, this concept is difficult to describe because of constantly changing economic relationships.
5. There is civil and criminal liability of unfair competition in Poland.

References

1. Bieńka G., Komentarz do Kodeksu cywilnego, Wydawnictwo Prawnicze LexisNexis, Warszawa 2011;
2. Czachórski W., Zobowiązania, Wydawnictwo Prawnicze LexisNexis, Warszawa 2009;
3. Dzienis P., Filipowski W., Cywilnoprawne aspekty korupcji gospodarczej, Palestra 2001, No. 11/12;

4. Kępiński M., Czyny nieuczciwej konkurencji (in:) Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz, ed. by Szwaja J., Wydawnictwo C.H.Beck, Warszawa 2010;
5. Kurczewski J., Łaciak B., Korupcja w życiu społecznym, Instytut Spraw Publicznych, Warszawa 2000;
6. Musztalski W., Komentarz do kodeksu pracy, Wydawnictwo C.H.Beck, Warszawa 2008;
7. Nowińska E., Vall M., Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji, Wydawnictwo Prawnicze, Warszawa 2001;
8. Podrecki P., Stosunek ustawy o zwalczaniu nieuczciwej konkurencji do ustawy o przeciwdziałaniu praktykom monopolistycznym, Przegląd Prawa Handlowego 1994, No. 12;
9. Radwański Z., Prawo cywilne- część ogólna, Warszawa 2009;
10. Salwa Z., Komentarz do Kodeksu pracy, Wydawnictwo Prawnicze LexisNexis, Warszawa 2003;
11. Surkont M., Odpowiedzialność karna za korupcję, Wojskowy Przegląd Prawniczy 2000, No. 1;
12. Tadeusiak M., Zwalczanie nieuczciwej konkurencji. Prezentacje ustawy o zwalczaniu nieuczciwej konkurencji (in:) Konkurencja a ochrona własności przemysłowej w gospodarce rynkowej, Poznań 1993;
13. Tarchalski K., Korupcja i przywilej, Wydawnictwo Naukowe Semper, Warszawa 2000;
14. The Law of 16.04.1993 on Combating Unfair Competition, Journal of Laws of 2003, No. 153, item 1503 as amended;

NESAŻININGOS KONKURENCIJOS REGULIAVIMAS LENKIJOJE - DISKUSIJA TEISINIU ASPEKTU

Santrauka

Nesažininga konkurencija yra teisei ar gerai praktikai prieštaraujanti veika, kenkianti ar pažeidžianti verslininko ar kliento interesus. Nesažiningos konkurencijos veiksmai apima klaidingas, melagingos informacijos pateikimą apie įmonę, prekę ar paslaugą, reklamą, trukdymą patekti į rinką kitiems rinkos dalyviams ir pan. Nesažiningos konkurencijos veiką apibrėžia specialūs įstatymai. Lenkijoje, tai yra 1993 m. balandžio 6 d. Konkurencijos įstatymas, reguliuojantis nesažiningos konkurencijos sferą. Lenkijoje konkurencijos pažeidimas apibūdinamas per kelis aspektus. Pirma, normų pažeidimas neatsiejamas su rinka. Pavyzdžiui, mokesčių ar maitų nemokėjimas leidžia verslininkui pasiūlyti mažesnes kainas ir taip tapti pranašesniu rinkos dalyviu. Antra, konkurencijos pažeidimas turi būti siejamas su geros praktikos ir moralės standartų pažeidimu. Nors moralė nėra teisės norma, tačiau teismai priimdami sprendimus turi vadovautis geros praktikos ir moralės standartais. Trečia, interesai, kuriuos apima nesažininga konkurencija aiškinami per ekonominio intereso prizmę. Ekonominio intereso sąvoką apibūdinti nėra lengva, nes ji susijusi su tam tikru poveikiu rinkos dalyviams, o šis poveikis gali būti įvairaus intensyvumo ir įvairiose srityse. Taigi, tiksliai apibrėžti kito verslininko ar kliento grėsmių pasekmes yra labai sudėtinga, nes sunku nurodyti pačias grėsmes. Taigi, Lenkijos įstatymo leidėjas Konkurencijos įstatyme nepateikia baigtinio sąrašo, kuriuo remiantis galima apibrėžti kurioje sferoje nesažininga konkurencija galima. Tokia įstatymo leidėjo pozicija yra teisinga, nes neįmanoma apibrėžti dinamiškai besikeičiančių ekonominių poreikių. Lenkijos Konkurencijos įstatyme nurodomos bendrosios sąlygos, apibrėžiančios nesažiningus konkurencijos veiksmus. Viena iš tokių yra kyšininkavimas. Kyšininkavimas kelia pavojų kitų rinkos dalyvių interesams ir suteikia kyšininkavime dalyvavusiems asmenis konkurencinį pranašumą. Remiantis tuo, jog sunku apibrėžti nesažiningos konkurencijos sąvoką, siūlytina nesažiningą konkurenciją sieti inter alia su geros praktikos ir moralės standartais.

Raktiniai žodžiai: nesažininga konkurencija, teisinis reguliavimas, ekonominis interesas, kyšininkavimas