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Civilian method of combating acts of unfair competition in the Polish Act of August 2, 1926

Cywilistyczna metoda zwalczania czynów nieuczciwej konkurencji w polskiej ustawie z 2 sierpnia 1926 r.

Abstract

The Polish doctrine of the interwar period created a number of legal acts constituting the system of industrial property or, more broadly, intellectual property. The article concerns one of the areas falling within the scope of intellectual property – unfair competition. This phenomenon was regulated by the Act of August 2, 1926, the main author of which was the outstanding Polish lawyer Fryderyk Zoll. In accordance with Zoll's intention, combating unfair competition was based mainly on the civil concept, in which general clauses played a very important role. The author argues that although Zoll, or the interwar doctrine, did not use the term general clauses, they appear in the act in question and effectively influence civil protection in combating unfair competition.

Keywords

intellectual property in the Second Polish Republic, industrial property in the Second Polish Republic, unfair competition, Act of August 2, 1926, on combating unfair competition.

Streszczenie

Polska doktryna okresu międzywojennego stworzyła szereg aktów prawnych składających się na system własności przemysłowej czy szerzej własności intelektualnej. Artykuł dotyczy jednej z dziedzin wchodzących w zakres własności intelektualnej – nieuczciwej konkurencji. Zjawisko to uregulowane zostało ustawą z dnia 2 sierpnia 1926 r., której głównym twórcą był wybitny polski prawnik Fryderyk Zoll. Zgodnie z intencją Zolla zwalczanie nieuczciwej konkurencji oparto w głównej mierze na koncepcji cywilistycznej, w której bardzo ważną rolę odgrywały klauzule generalne. Autor dowodzi, że pomimo nieposługiwania się przez Zolla ani przez międzywojenną doktrynę terminem klauzul generalnych występują one w omawianej ustawie i skutecznie wpływają na cywilistyczną ochronę w zwalczaniu nieuczciwej konkurencji.

Słowa kluczowe

własność intelektualna w II RP, własność przemysłowa w II RP, nieuczciwa konkurencja, ustawa z 2 sierpnia 1926 r. o zwalczaniu nieuczciwej konkurencji.

1. Introduction

Combating unfair competition has a very long history[1]. The first documented attempts to eliminate this phenomenon from economic life date back to ancient times[2]. Initially, this was done by using the punitive method of repression[3]. Under the threat of criminal sanctions, certain behaviour, described in detail and listed casuistically, which violated specific interests of economic participants, were prohibited.

The cut-off date for considerations on the theoretical model of combating manifestations of unfair competition in European legislation was set by the French Revolution of 1789, which laid the foundations for the civil method of combating unfair competition. However, the actual beginnings of juridical solutions based on the civil method of regulating this phenomenon appeared with the 19th century free-competitive capitalism. The new concept of unfair competition repression used the construction of subjective rights. The appropriate subjective right, preferably property right, was created based on the interest that was to be legally protected and secured[4]. However, the European doctrine was not uniform in terms of recognizing the legal good that is the subject of protection against unfair competition. In France, the need to repress unfair competition was justified by the need to protect the entrepreneur's subjective right (achalandage)[5]. The problem was completely different in Germany, where the differences in views on the legal good protected by the Act on Combating Unfair Competition were so fundamental that the representatives of the doctrine failed to establish a single consistent point of view. In German literature, the prevailing view to this day is that the subject of protection is the entrepreneur's personal right, consisting in the freedom to earn money or the entrepreneur's freedom of ac-

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[1] The article is a synthesis of the author's previous findings contained in the following works: T. Dolata, *Geneza ustawy o zwalczaniu nieuczciwej konkurencji z 2 sierpnia 1926 roku*, Acta Universitatis Wratislaviensis No 2620, „Prawo" 2004, vol. CCXC; T. Dolata, *Ustawa o zwalczaniu nieuczciwej konkurencji z 1926 roku. Charakterystyka ogólna*, Acta Universitatis Wratislaviensis No 2887, „Prawo" 2006, vol. CCXCVIII; T. Dolata, *Modele zwalczania nieuczciwej konkurencji w europejskiej nauce prawa początków XX wieku – zarys problematyki*, [in:] T. Kruszewski (ed.), *Nauka i nauczanie prawa w dziejach*, Wrocław 2011.

[2] See further: L. Górnicki, *Nieuczciwa konkurencja, w szczególności przez wprowadzające w błąd oznaczenie towarów lub usług, i środki ochrony w prawie polskim*, Wrocław 1997, p. 11.

[3] A. Peretz, *Z powodu ustawy o zwalczaniu nieuczciwej konkurencji*, „Przegląd Prawa Handlowego" 1926, no. 9, p. 397.

[4] F. Zoll, *Prawa na dobrach niematerialnych*, [in:] *Encyklopedia podręczna prawa publicznego*, ed. Z. Cybichowski, vol. 2, Warszawa [no publication date], p. 693; F. Zoll, *Przedsiębiorstwo – przedmiotem własności*, „Przegląd Prawa i Administracji" 1925, p. 428 *et seq*.

[5] T. Blumenfeld, *Klientela jako przedmiot obrotu i ochrony prawnej*, Warszawa 1932, p. 93.

tion[6]. The second important trend in German doctrine considers an intangible asset, such as an enterprise, to be the subject of protection[7]. There were also voices that combating unfair competition was aimed at protecting professional ethics[8].

However, apart from disputes regarding the subject of protection against unfair competition, it should be stated that post-revolutionary European legislation from the 19th and 20th centuries was divided into two completely different systems: common law[9], and the continental system.

Within the continental system, two, fundamentally different, groups of solutions have emerged at the forefront. The first group consists of legislation based on the penal method of repression; this punitive method of repression was a mental shortcut used in the doctrine to define the tort method of determining liability. Germany was the leader here, the first country to decide to regulate issues related to unfair competition in a separate act (1896 and 1909). At the other extreme was France, and the civil concept of combating unfair competition created and developed by French lawyers. A characteristic feature of the French solutions was the lack of a special law dedicated to the repression of this phenomenon. Through the skilful use of the Napoleonic Code, French jurisprudence and doctrine have interpreted a very comprehensive model for combating unfair competition. This model was based on a subjective right, which was the right to clientele. Any acts contrary to the subjective right sanctioned by the Act were unlawful, and constituted the basis for initiating a civil complaint, *i.e*., for activating the system of claims against the infringer[10].

2. Civilian concept of combating unfair competition

After Poland regained independence, there was a sudden need to legally regulate the phenomenon of unfair competition, which was regulated differently in each

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[6] This approach was advocated by, among others: O. Gierke, J. Kohler, H. Dernburg and R. Reinhardt.

[7] Supporters of this theory included, among others: A. Baumbach, R. Callmann, E. Reimer. See further: L. Górnicki, *Nieuczciwa konkurencja…*, p. 16–17; W. Siebert, *Verwirkung und Unzulässigkeit der Rechtsausübung*, Marburg 1934, p. 160 *et seq.*; M. J. Ehrlich, *Przedsiębiorstwo jako przedmiot umownych stosunków obligacyjnych*, Tarnów 1934, p. 34; J. Gierke, *Handelsrecht und Schiffahrtsrecht*, Berlin 1938, p. 155; T. Knypl, *Zwalczanie nieuczciwej konkurencji w Polsce i w Europie*, Sopot 1994, p. 37.

[8] R. Isay, *Das Recht am Unternehmen*, Berlin 1910, p. 54 *et seq*.

[9] See further: T. Dolata, *Modele zwalczania…*, p. 112.

[10] T. Dolata, *Zwalczanie nieuczciwej konkurencji na ziemiach polskich do 1926 roku*, Acta Universitatis Wratislaviensis No 2758, „Prawo" 2005, vol. CCXCIV, p. 197–198.

of the former partitions[11]. Moreover, international obligations obliged Poland to implement provisions on combating unfair competition[12].

The drafting of the Act on Combating Unfair Competition began at the beginning of January 1926[13], when the Government of the Republic of Poland entrusted Fryderyk Zoll (the younger)[14] with developing the draft act as quickly as possible. As a result, the Act on Combating Unfair Competition was adopted by the Parliament on August 2, 1926, announced on September 25, 1926, and entered into force on October 10, 1926 (Journal of Laws of the Republic of Poland, No. 96, item 559)[15].

In accordance with the intentions of prof. F. Zolla, acts of unfair competition had to be considered in two aspects. As acts causing damage to recipients of goods or services (consumers) and as behaviour violating the interests of entrepreneurs (competitors).

Consumer protection consisted mainly in the application of criminal law standards. This was related to a certain impotence of civil law in this area. Acts directed against consumers, usually meeting the criteria of fraud, did not cause significant financial damage to the consumer, justifying him or her filing a civil lawsuit. The costs and difficulties of a possible trial would be disproportionately high in comparison to the damage suffered. Additionally, administrative law was to play an important preventive function in the field of consumer protection. However, counteracting acts of unfair competition in relation to entrepreneurs should be based on civil law and the civil method of combating unfair competition appropriate to this law. This method was, according to Zoll, the most appropriate and most comprehensive in dealing with the repression of the phenomenon[16].

The civilistic concept used the construction of subjective rights. In Polish legal theory, thanks to Zoll, this subjective right was the ownership of an enterprise

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[11] See further: *ibidem*, p. 199–214.

[12] See: E. Dąbrowski, *Nieuczciwe współzawodnictwo*, Warszawa 1929, p. 119; K. Głębocki, *Uwagi z powodu ustawy: „O zwalczaniu nieuczciwej konkurencji"*, „Gazeta Sądowa Warszawska" 1926, no. 43, p. 585; M. Mayzel, *O zwalczaniu nieuczciwej konkurencji*, „Przegląd Prawa Handlowego" 1926, no. 5, p. 193; I. Rosenblüth, *Egzekucja na przedsiębiorstwie*, „Przegląd Notarialny" 1928, no. 1–2, p. 75; F. Zoll, *Projekt ustawy o zwalczaniu nieuczciwej konkurencji a sprawa kredytu realnego dla przedsiębiorców*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1927, vol. 3, p. 125.

[13] A. Kraus, F. Zoll, *Polska ustawa o zwalczaniu nieuczciwej konkurencji z objaśnieniami*, Poznań 1929, p. 1.

[14] Fryderyk Zoll (1865–1948), professor of law, one of the most outstanding Polish lawyers. He can easily be described as the creator of the interwar Polish intellectual property system. See further: L. Górnicki, *Założenia i koncepcja kodyfikacji prawa w II RP*, „Prawo i Więź" 2022, no. 4 (42), p. 646–648.

[15] See further: T. Dolata, *Geneza ustawy…*, p. 265–266.

[16] Criminal law was to be applied here only on a subsidiary basis.

as an intangible good[17]. The problem of determining the nature of a complaint regarding unfair competition caused some controversy in European legal theory. The dispute concerned the lack of consensus of opinion as to whether the complaint was a complaint in kind, or for damages. Zoll, presenting his concept of repression of unfair competition, took an intermediate position in this dispute. He concluded that this phenomenon should be combated as a violation of absolute subjective rights (effective *erga omnes*), and on the other hand, such repression should also be based on the tort liability regime creating relative rights (*in personam*). The consequence of these assumptions is the division of acts of unfair competition into two groups[18].

The first group included acts of appropriating the so-called the attractiveness of the company[19]. This misappropriation consisted, in particular, in the fact that the competitor performed acts capable of causing the recipients to falsely believe that certain services came from the injured entrepreneur (Article 1 of the Act on Combating Unfair Competition of 1926), or that the competitor's enterprise was identical to the enterprise the injured party (Article 2 of the Act)[20]. In such situations, a material complaint (*actio in rem*) was available, which protected the injured party regardless of the fault of the infringer (competitor)[21].

The second group of acts included acts aimed at causing damage to the attractive force, violating it in a manner contrary to applicable regulations or good customs, *i.e*., commercial honesty (Article 3 of the Act). These actions could be manifested in slandering the entrepreneur, „persuading, for competitive purposes,

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[17] See further L. Górnicki, *Koncepcja prawa na przedsiębiorstwie Fryderyka Zolla*, [in:] *Państwo, prawo, społeczeństwo w dziejach Europy Środkowej: księga jubileuszowa dedykowana Profesorowi Józefowi Ciągwie w siedemdziesięciolecie urodzin*, Katowice–Kraków 2009, p. 213–223; see also: T. Dolata, *Ustawa o zwalczaniu*…, p. 241–244.

[18] Broadly: L. Górnicki, *Nieuczciwa konkurencja...*, s. 18; L. Górnicki, *Wpływ obcych ustawodawstw i doktryny prawa na polską kodyfikację prawa prywatnego w Drugiej Rzeczypospolitej*, „ZNUJ. Towarzystwo Biblioteki Słuchaczów Prawa. Zeszyty Prawnicze", vol. 13, A. Korobowicz, M. Stus (ed.), *Korzenie i tradycje współczesnego prawa cywilnego w zjednoczonej Europie*, Kraków 2005, p. 76–78, and there is an extensive literature.

[19] According to Zoll, the attractive power of a company is the company's ability to acquire and maintain its clientele. See further: A. Kraus, F. Zoll, *op. cit*., p. 59.

[20] Such behaviour, defined by the Act as "intrusion into the entrepreneur's clientele", is an analogy to violating property rights in physical items, therefore claims arising from them should be treated as claims (complaints) in kind, A. Kraus, F. Zoll, *op. cit*., p. 62.

[21] OSN of 18.10.1935, C I 122/35, „Orzecznictwo Sądów Polskich" 1936, item 267, p. 250–251; F. Bossowski, *Ochrona przeciwko nieuczciwej konkurencji ze stanowiska prawa porównawczego oraz prawa rzymskiego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1934, vol. 3, p. 131; A. Kraus, F. Zoll, *op. cit*., p. 67.

not to fulfil the official duties of the company's bodies" or revealing technical or commercial secrets of the company. In addition to the objective qualification (causing damage), the factor determining the liability of the infringer was also the subjective qualification – guilt[22]. The injured party had a tort complaint (*actio in personam*) at his disposal[23].

3. General clauses

Violation of the civil provisions of the Act gave rise to a civil tort against which appropriate claims could be made.

The provisions of the Act were of fundamental importance for such a civil law model of combating unfair competition (Art. 1 section 1 and Art. 3 of the Act). Contemporary doctrine rightly treats these provisions as general clauses[24], although the creator of the Act, Prof. Zoll, neither in the commentary nor in his extremely rich scientific achievements, used such terminology in relation to any of the indicated provisions. This was a consequence of Zoll's concept of enclosing unfair competition in two groups of acts: appropriation and damage to the attractive power of the enterprise, without referring to the general clause – characteristic of the German model. Similarly, the interwar doctrine did not recognize general clauses in the Act[25], although in relation to Art. 3, the importance of this article was emphasized, bringing it closer to the general clause[26]. Nowadays, the provisions of Article 1 section 1 and Art. 3 of the 1926 Act are commonly referred to as the small and large general claus-

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[22] Compare OSN of 10.01.1936, C III 520/34, „Zbiór Orzeczeń Sądu Najwyższego, Izba Cywilna" 1936, p. 1176–1183.

[23] See especially: F. Zoll, *Prawa na dobrach…*, p. 695–696; *idem*, *Prawo cywilne, t. 2, Prawa rzeczowe i rzeczowym podobne*, Poznań 1931, p. 153–155; *idem*, *Przedsiębiorstwo…*, p. 432–435; Compare: T. Blumenfeld, *op. cit*., p. 103–104. There is also a critical analysis of the division into *actiones in rem* and *actiones in personam* (pp. 105 *et seq.*). Also, critically about the concept of this division in relation to the essence of acts under Art. 1 and 3: J. Namitkiewicz, *Uwagi nad polską ustawą o zwalczaniu nieuczciwej konkurencji*, „Przegląd Prawa Handlowego" 1927, no. 6, p. 241–245, and no. 7, p. 294–303. There, the author tries to argue that the differences between the acts included in both articles are so small that they do not justify regulating them in the form of two separate articles of the Act.

[24] J. Preussner-Zamorska, *Problematyka klauzul generalnych na gruncie ustawy o zwalczaniu nieuczciwej konkurencji*, „Kwartalnik Prawa Prywatnego" 1998, vol. 4, p. 649; J. Szwaja, *Die Genese der Generalklausel des neuen polnischen UWG*, „Gewerblicher Rechtsschutz und Urheberrecht" 1996, no. 4, p. 486.

[25] R. Kuratow-Kuratowski, *La nouvelle legislation polonaise sur la repression de la concurence deloyale*, „Bulletin Mensuel de la Societe de Legislation comparee " 1927, no. 7–9, p. 347.

[26] T. Blumenfeld, *op. cit*., p. 108, 117.

es, respectively. Despite the consensus in the literature regarding the fact that both provisions constitute general clauses, it is worth highlighting the elements in each of them that constitute the definition of a general clause[27].

3.1 Small general clause

The Act on Combating Unfair Competition of 1926 opened with a general clause contained in Art. 1 section 1[28]. It was the phrase "invading the entrepreneur's clientele". This term, foreign to the existing statutory nomenclature, has caused some controversy in doctrine and practice[29]. However, despite its vague nature, this phrase did not cause any interpretation difficulties. It meant appropriating the attractive power of the company[30].

The basic instructions on how to penetrate the entrepreneur's clientele were contained in the subsequent part of this provision. Another vague concept appeared there – "any activity capable of causing a false opinion […]"[31]. General interpretative assumptions indicated that the behaviours in question[32] had to be aimed at causing an error, or at least the possibility of causing an error[33], among recipients as to the origin

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[27] In Polish doctrine, we encounter a number of controversies regarding the understanding of the term "general clause". In particular, they concern the relationship of the general clause to the legal provision. The essence of the dispute is the issue of whether the clause is an entire legal provision containing a phrase referring to extra-legal criteria, a part of the provision (a normative phrase being such a reference), or perhaps the name of the extra-legal criterion itself. I quote from K. Wójcik, *Teoretyczna konstrukcja klauzuli generalnej*, „Studia Prawno-Ekonomiczne" 1990, p. 49. Without taking part in this discussion, I assume that the general clause is a linguistic phrase that is part of a legal provision, the basic features of which are unclear meaning, evaluative nature, reference to non-legal criteria that are the basis for the evaluation and creating decision-making freedom for the authority.

[28] „An entrepreneur has the right to demand that another entrepreneur (competitor) not encroach on his clientele through any activities that could cause people to whom he offers his products, goods or services to the false belief that they come from the first entrepreneur".

[29] M. Jastrzębski, *Kwiatek ustawodawstwa*, „Prawda" 1926, no. 45, p. 5; J. Namitkiewicz, *op. cit.*, p. 301–302; A. Peretz, *op. cit.*, p. 400, 410.

[30] A. Kraus, F. Zoll, *op. cit*., p. 63–64.

[31] See further: „Orzecznictwo Sądów Polskich" 1929, vol. VIII, item. 461, Supreme Court ruling of 6.02.1929, Rw 2277/28, p. 403–405. The facts presented therein prove that liability for invading the entrepreneur's clientele may consist in, for example, cooperating in invading the clientele, *e.g*., selling products belonging to a third party, illegally marked with someone else's trademark. This allows for the thesis that the concept of "any activity" should be interpreted very broadly and any act related to intrusion into the clientele will constitute the basis for holding the infringer liable.

[32] It was all about the competitor's actions; the concept of "action" did not include behaviour consisting in omission – J. Hryniewiecki, *Ustawa z dnia 2 sierpnia 1926 r. o zwalczaniu nieuczciwej konkurencji*, „Świat Kupiecki" 1926, no. 41, p. 880.

[33] M. Howorka, *Ustawa z dnia 2-go sierpnia 1926 r. o zwalczaniu nieuczciwej konkurencji*, Poznań 1926, p. 6. Similarly, case law: Supreme Court ruling of 22.09.1932 r. Rw 838/32, „Przegląd Prawa Handlowego" 1932, no. 8 p. 440–442. When assessing the ability to cause an error, it was not

of the goods (products, services) from a certain entrepreneur – the so-called "confusion". These activities most often involved the infringing party placing its own products on the market with similar trade markings as those on the goods of the injured entrepreneur. Imitation of the marking of goods could concern their verbal, pictorial or mixed (verbal and pictorial) marking[34], and confusion existed only when the sign imitated by a competitor individualized another enterprise (*i.e.*, distinguished it from other enterprises offering the same goods). To sanction such facts, the Act on Combating Unfair Competition additionally referred to regulations and conceptual framework in the field of protection of inventions, designs, and trademarks[35].

The term "invading the entrepreneur's clientele" was an evaluative expression. It was definitely assessed negatively. The assessment was made in terms of the effects that the competitor's actions had or could potentially have. These effects manifested themselves in the capture of the clientele and the deprivation of the profit due to the entrepreneur. The question of the competitor's motives, even his possible good faith, was irrelevant[36].

Another element justifying the statement that "intrusion into the entrepreneur's clientele" should be considered a general clause was the reference to extra-legal criteria. The formula of this term did not define in detail the set of extra-legal factors that were to be taken into account in this construction. However, due to the origin, purpose, and nature of the Act on Combating Unfair Competition, it should be assumed that the factor was the economic interest of the entrepreneur, and more broadly, the certainty of legal economic transactions and – consequently – the economic development of the country.

A special form of intrusion into the entrepreneur's clientele was the marking of an enterprise that misled recipients as to its identity with another competitive enterprise, re-

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about details but about the general impression: the Supreme Court ruling of 17.09.1935 r., C II 806/35, „Przegląd Prawa Handlowego" 1936, no. 5, p. 275–277; Supreme Court ruling of 18.05.1937 r., C II 2570/36, „Przegląd Prawa Handlowego" 1937 no. 9, p. 415–417.

[34] As for the restrictions resulting from such marking of goods, see further: A. Kraus, F. Zoll, *op. cit*., p. 68–81.

[35] This issue was regulated by the provisions of the Act of February 5, 1924 on the protection of inventions, designs and trademarks (Journal of Laws of the Republic of Poland 1924, No. 31, item 306), and then the Regulation of the President of the Republic of Poland of March 22, 1928 on the protection inventions, designs and trademarks (Journal of Laws of the Republic of Poland 1928, No. 39, item 384).

[36] According to the thesis of the above-mentioned Supreme Court ruling of October 18, 1935 C I 122/35: „for an act of unfair competition to occur, it does not need to be accompanied by the competitor's intention to mislead the clientele or the intention to intrude on someone else's clientele, because the claim based on Art. 1 and 2 of the Act on Combating Unfair Competition exists even if the competitor did not know that he was violating the sphere of another entrepreneur".

gardless of the latter's registered office (Article 2(1)). The criteria for causing confusion in relation to the company or other markings of a competitive enterprise were analogous to misleading marking of goods. It was enough that the company's mark could mislead a potential buyer[37], and the risk of confusion was verified according to the discriminative ability of the average purchasing public, which was based on the overall impression (sound or image) of a given sign[38]. An important novelty justifying the application of Art. 2 was the competitive nature of the injured company and the desire to acquire clients in the same territory. An important factor influencing the protection of enterprises under Art. 2 was also the size of the area where the competition took place. In the case of small enterprises, protection could be limited to one district or even a street.

Danger of confusion, pursuant to Art. 2, also occurred if the competitor marked the enterprise with his own name[39] or company, adding certain characteristic phrases that included someone else's name or company and the relationship between the competitor and this person or company, e.g.: "Kowalski's heir of entrepreneur X" or "Kowalski's former partner of X company". These additions, if true, were permitted[40] and could be used even without the permission of the person (company) whose name (company) was used. However, in a situation where the signs could be misleading as to the relationship between the competitor and the entrepreneur mentioned in the company addendum, then these signs fell under the prohibition contained in Art. 2 of the Act.

3.2 Large general clause

When analysing the structure of the Polish Act on Combating Unfair Competition of 1926, Art. 3, which was the so-called large general clause, a characteristic feature of this provision was a very broad definition of the scope of regulation, which covered the following behaviours:

- causing or likely to cause damage to the entrepreneur;
- not included in the torts of unfair competition specified in Art. 1 and art. 2 of the Act;

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[37] M. Howorka, *op. cit*., p. 7; see also the Supreme Court ruling of September 30, 1932, III.2.C. 63/32, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1933, z. 2, p. 469.

[38] A. Kraus, F. Zoll, *op. cit*., p. 139–140.

[39] „An entrepreneur cannot be prohibited from including his name in the company name, even if this name is already included in the name of another company" – Supreme Court ruling of May 12, 1932, III Rw 785/32.

[40] The judgment confirming this thesis was the Supreme Court ruling of March 12, 1936, C II 2564/35, „Zbiór Orzeczeń SN, Izba Cywilna" 1936, poz. 396, p. 1025–1027, according to which „additions to the company of a limited liability company indicating the relationship of the partners should be true; Therefore, the addition of the word brothers in a company is unacceptable if the partners are not brothers".

– characterized by illegality, *i.e*., contradiction with applicable regulations or contrary to good customs, especially commercial honesty.

All these conditions had to exist together. Moreover, the legislator included in Art. 3 exemplary enumeration of acts that complement this norm[41].

General clause from Art. 3 of the Act on Combating Unfair Competition consisted of two alternative premises, each of which bore the characteristics of a general clause:

a) contradictions with applicable regulations;
b) contradictions with good customs (merchant honesty)[42].

As for the contradiction with applicable provisions, the act did not specify what provisions were being violated (the phrase was not specified). However, the content of this premise was not controversial in the doctrine and case law, hence it was not given much attention. Suffice it to say, that acts violating the Act or a subjective right granted under the Act were considered contrary to the applicable provisions[43].

An activity contrary to applicable regulations was valued negatively because it violated a certain system of values imposed by the legislator. This system had to be looked at in the context of the purpose of the Act on Combating Unfair Competition, *i.e*., through the prism of protecting the interests of the entrepreneur. For this reason, anything that led to the violation of these interests was assessed negatively. Such an axiological order was an extra-legal criterion that was the basis for valuation.

When it comes to the application of the criterion of "good customs", this criterion has a rich origin in legislation. It certainly appeared in Roman law. Initially, it served as an incentive to make the law more flexible and more effective, and it meant violating the general principles of the legal system resulting from all the regulations[44]. Through evolution, it acquired an ethical meaning and encompassed

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[41] Providing false information about the company (slandering the entrepreneur), "persuading" the company's competitive bodies not to fulfil their official duties for the purposes of the competition, disclosing technical or commercial secrets of the company.

[42] The presence of two premises in this juridical construction resulted in calling it the so-called large general clause.

[43] It was not only about violating the provisions (civil and criminal law) of the Act on Combating Unfair Competition and the acts listed in this Act (Article 4(2) and (3), Article 7(1), Article 8(1) and Article 15) but also, for example, for violation of personal rights (right to a name), copyrights, property rights, police law or industrial law regulations regarding the protection of an entrepreneur – J. Szwaja, *op. cit.*, p. 486; see also: Supreme Court ruling of November 30, 1934, C II 1744/34, „Zbiór Orzeczeń SN, Izba Cywilna" 1935, item. 218, in which the Supreme Court stated that using someone else's company to designate the products of your company falls under the concept of unfair competition by harming the entrepreneur by means of acts contrary to applicable regulations.

[44] "Roman lawyers were perfectly aware that issuing individual provisions by law is not sufficient to ensure the implementation of justice in commercial relations, because a party will always find a way to achieve its goal by skilfully moving between legal provisions. Therefore, Roman lawyers tried to

everything that was contrary to the ethical sense. As a result, conduct contrary to good customs meant a violation of the general principles of the legal system or an insult to the citizen's ethical sense[45]. "Good customs" were therefore the result of the influence of ethics and morality on the law[46].

The concept of "good customs" appeared in the civil codes of the partitioned states that were in force on Polish lands after 1918 (in the Napoleonic Code of 1811, ABGB of 1811, BGB of 1896 and in the Svod Zakonow of 1832.)[47]. This term was also used by the German legislator in the second Act on Combating Unfair Competition of 1909.

In Poland, the term "good customs", apart from the Act on Combating Unfair Competition, also appeared in labour law, private international law, and the Code of Civil Procedure[48]. The presence of this term should also be emphasized in acts of public international law – international agreements to which the Polish state was a party[49].

Contrary to good practices in the Act on Combating Unfair Competition of 1926, as an ill-defined phrase, was subject to judicial interpretation[50]. Due to the fact that the signs of good manners cannot be determined *in abstracto*, the legislator provided a clear interpretation guide, using the criterion of commercial honesty. The violation of the concept of good manners in a specific case was decided each

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create rules resulting from all the principles of the legal system, which cannot be violated and which give the judge a guideline for assessing a particular case" – I. Koschembahr-Łyskowski, *Conventiones contra bonos mores w prawie rzymskim*, Kraków 1925, p. 7–8.

[45] *Ibidem*, p. 14, 16.

[46] The relationship between morality, customs, and law was brilliantly captured by Z. Fenichel, *Pojęcie „dobrych obyczajów" w prawie polskim*, [in:] *idem*, *Polskie prawo prywatne i procesowe. Studia*, Kraków 1936, p. 673–679.

[47] R. Longchamps de Berier, *Czynności prawne*, [in:] *Encyklopedia podręczna prawa prywatnego*, vol. 1, Warszawa [no publication date], p. 195.

[48] See closer: Z. Fenichel, *op. cit*., p. 689–702.

[49] In the Trade and Navigation Treaties concluded between Poland and Denmark on March 22, 1924 (Journal of Laws of the Republic of Poland No. 74, item 736) – in Art. 19; Poland and Iceland on March 22, 1924 (Journal of Laws of the Republic of Poland No. 74, item 734) – in Art. 7; Poland and the Netherlands on May 30, 1924 (Journal of Laws of 1925, No. 60, item 422) – in Art. 3; and others.

[50] An example of a judgment constituting a judicial interpretation was the Supreme Court ruling of May 20, 1932 (I C 2564/31): „The condition for the application of Art. 3 of the Act on Combating Unfair Competition is not only the existence of an economic advantage of one competitor over another, which is in itself a normal manifestation in commercial transactions, not prohibited by law, but also the use of this advantage with the intention of bringing the competitor to ruin". In another ruling, the Court found it contrary to good manners and commercial honesty to include an insurance agent on the list of agents in arrears with the balance, when in fact the agent was not in arrears with this balance. See closer: Supreme Court ruling of January 10, 1936 (C III 520/34), „Zbiór Orzeczeń SN, Izba Cywilna" 1936, p. 1176–1183.

time by a judge who, based on all the circumstances of the case[51], ruled based on the objective sense of positive values existing in merchant circles. The exponent of these positive values was the average moral level characteristic of a decent earning and economic life. This meant that it was unacceptable to assess interference in the sphere of good manners on the basis of the worldview and ideas of people with an excessively high sense of commercial honesty, as well as people tolerating grossly unethical commercial practices[52]. It was about what fair dealing actually considered permissible and what was impermissible. It is worth emphasizing that when qualifying an act as contrary to good customs (merchant honesty), the judge did not address the issue of whether the actor was aware of the violation of good customs or whether he was not aware of it.

As you can see, the Polish legislator gave priority to the objective criterion for assessing a given act as violating good manners (rules recognized by merchant circles), completely ignoring the subjective factor (judgments of the person committing the act of unfair competition).

The main motive for using two general clauses in the Act on Combating Unfair Competition of 1926 (in Article 1 and Article 3) was the legislator's belief in the need to create a very flexible and, therefore, effective civil law model for combating unfair competition. It was an original procedure, with no equivalent in the world legislation of that time.

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[51] The judge analysed the behaviour in terms of the content, motives and purpose of the action taken. For example: whoever failed to pay liabilities on time due to financial difficulties was not acting contrary to good commercial customs, and whoever withheld payments to cause the bankruptcy of a competitor was violating good customs. Another example is provided by the Supreme Court ruling of May 6, 1938, C III 827/36, according to which: „Selling goods in retail transactions below the price agreed contractually between the manufacturer or supplier and its recipient may, in special circumstances, be contrary to good customs and principles of commercial honesty".

[52] A. Kraus, F. Zoll, *op. cit*., p. 170–172. Traditionally, Polish doctrine also represented the view that a universally understood ethical criterion should be used to assess an act in terms of violating good morals. The basis of this view was the assumption that merchant ethics, as a uniform concept for everyone, is no different from the ethics of any other person or profession. E. Dąbrowski, *op. cit*., p. 12.

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