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THE INSTITUTION OF "POKUTNE" IN POLISH UNFAIR COMPETITION LAW

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The article examines the so called "pokutne" institution provided in the Law of the Republic of Poland of 16 April 1993 "On Combating Unfair Competition". To that end, not only legal rules, but also Polish jurisprudence and the legal doctrine are analyzed. The criteria which are or may be taken in account by Polish courts for determining the sum of the mentioned monetary claim are detected. It is concluded that, due to some objective factors, the mentioned institution cannot be borrowed by the Belarusian civil law.

Key words: unfair competition; civil law claims; losses; monetary compensation; "pokutne"; legal certainty.

"POKUTNE" КАК ИНСТИТУТ ПОЛЬСКОГО ПРАВА О НЕДОБРОСОВЕСТНОЙ КОНКУРЕНЦИИ

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Рассматривается закрепленный в Законе Республики Польша от 16 апреля 1993 г. "О борьбе с недобросовестной конкуренцией" правовой институт, именуемый "pokutne". Проанализированы не только правовые нормы, но также польская судебная практика и доктрина. Выявлены критерии, которые принимаются или могут быть приняты во внимание польскими судами при определении суммы упомянутого денежного требования. Сделан вывод о том, что вследствие определенных объективных факторов указанный институт не может быть заимствован гражданским правом Республики Беларусь.

Ключевые слова: недобросовестная конкуренция; гражданско-правовые требования; убытки; денежная компенсация; "pokutne"; правовая определенность.

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Modern economic conditions are characterized by fierce competition of market participants, pushing them to find the ways to increase their sales, inter alia, by means of export. In this regard, entrepreneurs' full awareness of foreign rules of competitive struggle and the consequences of their violation, through unfair competition among others, has particular importance. Profound knowledge of successful foreign legal experience in combating unfair competition is also useful for the formation of the in-depth, clear and effective domestic legal regulation in this field by the Belarusian law-making bodies.

The purpose of this article is to identify the nature, specifics and particularities of the application of the so called "pokutne" institution provided in the Law of the Republic of Poland of 16 April 1993 "On Combating Unfair Competition" (hereinafter – UCL) [1], as well as the possibilities of its planting in the Belarusian legal soil.

The questions relating to the "pokutne" are considered mainly in the works of Polish scholars (for example, K. Jasińska and J. Szwaja [2], P. Podrecki [3], J. Rasiewicz [4], K. Szczepanowska-Kozłowska [5], A. Tischer [6], E. Wojcieszko-Głuszko [7]) and exclusively in the context of the national legal system.

The provision on the "pokutne" was included in the UCL by the Law of the Republic of Poland of 16 March 2000 "On Amending the Law "On Combating Unfair Competition" and Amending the Law "On Radio and Television"" (Para 2)¹ [8]. According to Art. 18 (1) (6) of the UCL, in case of committing of a guilty act of unfair competition, the entrepreneur whose interest is threatened or violated may demand the award of an appropriate amount of money for a definite social goal related to the support of Polish culture or the protection of the public heritage.

It bears noting that Art. 18 of the UCL is placed in section 3 "Civil Liability". In Polish legal doctrine the "pokutne" is unanimously recognized as a kind of civil law sanction.

According to the rationale for the Draft Law of the Republic of Poland "On Amending the Law "On Combating Unfair Competition" and Amending the Law "On Radio and Television"" the introduction of this sanction was necessitated by the general need to intensify repression for the actions contrary to the principles of fairness in turnover as well as by the following facts:

1) the criminal sanctions provided for in the UCL, can apply only in the case of "essential" or "serious" loss and thus have limited application;

2) compensation in cases of unfair competition is sought in exceptional cases due to the complexity of determining the amount of the loss caused to an aggrieved person.

Moreover, the authors of the rationale believed that the introduction of such a sanction would be important

in terms of providing the UCL with a more pro-consumer nature, since the right to claim a certain amount of money had to be enjoyed not only by the aggrieved parties and entrepreneurial organizations, but also by the organizations whose statutory purpose was the protection of consumers, and by the Chairman of the Office of Competition and Consumer Protection [9].

The "pokutne" "allows the achievement of certain goals of the Law "On Combating Unfair Competition", the realization of which is difficult and often impossible through other claims provided for in the Law" (The Decision of the Court of Appeal in Cracow, III Labor and Social Welfare Department, 21 June 2017 (Sygn. Akt III APa 8/17) [10]. "The other two monetary claims set forth in the Law (on recovery of losses and unjustified enrichment) do not give the victims complete satisfaction, especially because proving the amount of loss or enrichment in practice is excessively complicated. These issues *de facto* result in the enrichment of the person who has committed the act of unfair competition, and make such offences profitable. The "pokutne" can be applied to eliminate this profitability, which allows better realization of the function of preventing unfair competition in business" [4, p. 1031].

Analyzing the provisions of the UCL on the "pokutne", we can distinguish its inherent features:

1) the purposes of awarding the "pokutne" shall relate to the support of Polish culture or the protection of the public heritage. It means that its beneficiaries are only the institutions and entities with such statutory objectives [5, p. 572]. The plaintiff may be a beneficiary if he or she meets this criterion. The persons carrying out the activities beyond the mentioned goals, in particular commercial activities, are not excluded from the range of beneficiaries. But in this case, they have to use the awarded sum exclusively for the social purposes [4, p. 1032]. As a famous Polish scholar E. Wojcieszko-Głuszko points out, the objective for which the payment is made, as well as its beneficiary, are indicated by the plaintiff [7, p. 133];

2) the "pokutne" can be awarded only at the request of the actual or potential victim;

3) the claim to pay the "pokutne" is not connected with other civil law claims under the UCL;

4) the prerequisite for pursuing this claim is the fault of the person who committed an act of unfair competition. "Any form of fault is sufficient, therefore, whether it is carelessness or negligence" [2, p. 813]. "The fault, in accordance with the general rule of proof, must be demonstrated by the subject who wants to be protected on the basis of Art. 18 (1) (6) of the Law" [5, p. 571];

5) the "pokutne" is awarded solely in the monetary form;

6) "The power for deciding on such payment and the amount thereof lies with the court" [11, p. 237].

¹ Hereinafter translated by N. M.

The Polish jurisprudence has developed certain criteria, which are taken into account for this purpose. The most common ones are:

- the degree of the defendant's fault;
- the scale of violation;
- the amount of money that the defendant would have to pay in order for the use of the plaintiff's benefit or right to be legal;
- the defendant's financial situation.

It is worth mentioning that, as a rule, courts use several criteria **cumulatively**. There are some examples.

The degree of the defendant's fault and the scale of violation. Thus, in 2010, the District Court in Warsaw (XX Economic Department) heard (repeatedly) the case between J. G. and I. W. (the plaintiffs) and W. T. (the defendant). In that case, the defendant was accused of having designed his advertisement in the Internet search engine in such a way that, when someone inserted the combination of the words being the part of the plaintiffs' company name in the search engine, an advertising link to the defendant's Internet page appeared.

One of the claims, insisted on by the plaintiffs, was the awarding of the "pokutne" in the amount of 10 000 Polish zloty. The Court in its decision of 3 May 2010 (Sygn. Act XX GC 777/09) ruled that "...the accused person deliberately committed an act of unfair competition, violating the plaintiffs' right to use their company name in their advertisements. He carried out a deliberate unlawful action, contradicting the obligation to refrain from it, foreseeing the consequences in the form of the competitor's loss. Despite the calls to stop the violation of the plaintiffs' right to the company name in advertising its services, the defendant had violated it for about a year and a half. The level of the perpetrator's fault is high. At the same time, the violated benefit enjoys the highest protection. These two conditions are sufficient to conclude that the amount of 10 000 Polish zloty intended for a social purpose cannot be regarded as excessive, on the contrary, it is relatively low. In addition, it was noted that "the social dimension of the violation is also important. Internet advertising has a huge range of impact, its effectiveness (expected and achieved) is high compared to other ways of reaching the client and attracting him to purchase a product or service. In particular, due to a very wide range of recipients in times of universal access to the Internet" [12].

The degree of the defendant's fault, the scale of the violation and the amount of money that the defendant would have to pay in order for the use of the plaintiff's benefit or right to be legal. This approach may be illustrated by the case between two limited liability companies, heard in 2012–2013 by the District Court in Szczecin (VIII Economic Department). In this case, the plaintiff and the defendant produced environmental protective equipment. The plaintiff concluded a performance contract with P. G., according to which P. G. made 3D graphics (rendering) of the separators produced by the plaintiff and transferred

the copyrights to it to him. The defendant posted the rendering of, allegedly, his separators, almost completely copying the specified plaintiff's 3D graphics on his website. One of the plaintiff's claims was to oblige the defendant to pay the "pokutne" in the amount of 500 Polish zloty in favor of the Fund <...>. In its Judgment of 14 October 2013 (Sygn. Akt VIII GC 83/12), the Court held that the defendant's actions constituted a violation of the plaintiff's copyright and an act of unfair competition.

According to the Court, "the parties... remain in close competitive relations, offering similar products on the same (geographical) market... the placement (guilty, at least unintentional) of the defendant's computer graphics modeled on the plaintiff's goods on the website may mislead the customers searching for the devices produced by both competitors with respect to the design and functional characteristics of the defendant's goods, since it implies their structural confusion with the goods offered by the plaintiff". The court upheld the plaintiff's claim, noting that the amount demanded by him was not excessive in view of the scale of the violation and the defendant's fault and was consistent with the single payment that the defendant (in accordance with the expert's opinion) would have to pay to obtain the right to use the renderings [13].

The scale of the violation and the defendant's financial situation. In 2016 the Court of Appeal in Białystok (I Civil Division) heard an appeal against the decision of the District Court in Białystok of 11 March 2016 (Sygn. Akt VII GC 3/14). The decision was awarded on the case, where both the plaintiff and the defendant were limited liability companies, carrying out, among others, entrepreneurial activities related to the production, wholesale and retail sale of alcohol. The District Court in Białystok acknowledged that the defendant's placement of the word "vodka" on the bottles of his alcoholic products with the percentage of the ethyl alcohol lower than 37.55 during 2012–2014 was misleading consumers, representing, in particular, unfair competition. In accordance with the Decision of this Court the defendant had to pay in favor of the Fund the "pokutne" in the amount of 50 000 Polish zloty. In the Court's view, "...imposing a property sanction on the defendant in a larger amount would represent an excessive financial burden, given that the provincial Commercial Quality Inspector L. had already fined him 103 035. 38 PLN". The plaintiff disagreed with that and demanded in his appeal an increase in the "pokutne" to 100 Polish zloty. In its decision of 25 October 2016 (Sygn. Act I ACa 406/16), the Białystok Court of Appeal stated that: "...the scale of the violations is illustrated, on the one hand, by the duration of the perpetrator's activity, by participation of... in the market and by the mass character of his sales, on the other – by the amount of the savings made by the defendant due to a decrease in the alcohol content below the minimum threshold required for vodka. Taking into account

these factors, as well as the defendant's very good financial situation, it is necessary to hold the objection of the plaintiff raised in his appeal, according to which, limiting the sum of the "pokutne" 50 000 PLN, the Court of the First Instance violated Art. 18 (1) (6) of the UCL. In the analyzed situation the correct application of this requirement demands the complete satisfaction of the claim for the award of the relevant amount of money. In the view of the Court of Appeal, the amount of 100 000 PLN, the so-called "pokutne" awarded in the interests of the Fund... in the circumstances of the case is not excessive, even taking into account the punishment imposed on the defendant... (103 035. 38 PLN). These amounts together represent only less than 0.55 % of the defendant's savings made by the reducing of the content of alcohol" [14].

A number of court decisions mention other criteria for calculation of the "pokutne". For example, the Decision of the Court of Appeal in Cracow (III Department of Labor and Social Security) (Sygn. Akt III APa 8/17) states that: "Among the criteria to be applied to the assessment of the appropriateness of the amount claimed, shall be mentioned: the scale and **frequency of violations, the range of the addressees of the act, the manner in which the perpetrator acted, the nature of the interests concerned by the violation** (see the Decision of the Court of Appeal in Warsaw of 11 December 2008, I ACa 565/08; the Decision of the Court of Appeal of Szczecin of 4 July 2007, I ACa 400/07). Other criteria affecting the amount of the "pokutne" (monetary compensation) are: **the conduct of the perpetrator after the initiation of the proceedings against him, in particular, respect or neglect of a possible earlier ruling on granting interim measures of protection; the severity of the consequences of the act for the aggrieved entrepreneur**. Given a certain similarity [of the "pokutne"] with the institution of satisfaction settled in Art. 448 of the CC [Polish Civil Code], in assessing whether the claimed amount of the "pokutne" (monetary compensation) is appropriate, it is also possible to alternatively use the prescriptions developed by the jurisprudence with respect to the mentioned rule. In particular, the amount of the awarded sum shall depend on the degree of fault, **the size and intensity of loss, the type and extent of the negative consequences of the act**" [10].

Unlike the UCL, the Law of the Republic of Belarus of 12 December 2013 "On Counteraction to Monopolistic Activities and Promotion of Competition" [16] does not contain the norms on civil protection against unfair competition. Art. 1030 of the Civil Code of the Republic of Belarus of 7 December 1998 (hereinafter – CC) [17] allows the person who suffered from unfair competition to demand that the person carrying out unfair competition:

- terminate the illegal actions;
- publish the disclaimer of the disseminated information and actions, which constitute the contents of unfair competition;

- compensate for the losses incurred.

In addition, the mentioned person may resort to certain, consistent with the civil offense at issue, general civil remedies, listed in Art. 11 of the CC, in particular, to demand the restoration of the situation which existed before the violation of the right, compensation for moral damage (provided that the aggrieved person is an individual), etc. If unfair competition is accompanied by or manifests in the violation of exclusive rights to the object of copyright or neighboring rights, in our mind, it is also possible to resort to such a specific civil remedy as compensation (Art. 56 (2) of the Law of the Republic of Belarus of 17 May 2011 "On Copyright and Neighboring Rights" [18]).

As we can see, in the Belarusian civil law there is neither analogous, nor similar to the Polish "pokutne" civil remedy available in cases of unfair competition. The same applies to other civil offenses.

In our opinion, the implementation of the institution of the "pokutne" into national civil legislation is inappropriate for the following major reasons.

Under the CC civil law protection is aimed at suppression of civil rights violation, eliminating obstacles to their enjoyment, restoration of the violated rights and compensation of the losses incurred by the aggrieved person. In its turn, civil liability has compensatory character, aimed at restoration of the property sphere of that person at the expense of the perpetrator's property. At the same time, the "pokutne" is purposed for and awarded for the achievement of completely different goals, which are mainly focused on the satisfaction of public rather than private interests. In the light of the Belarusian civil law, as in the light of the Polish law, the "pokutne" would represent "an incomprehensible mutation of various civil and criminal remedies" [15].

Setting forth a norm similar to the one provided in Art. 18 (1) (6) of the UCL in the domestic legislation in the absence of any benchmarks for the determining the amount of the "pokutne", as well as the limits that it cannot exceed, in our view, would contradict the principle of legal certainty, which according to the Constitutional Court of the Republic of Belarus presupposes "...**clarity, accuracy**, non-contradiction, logical consistency of legal norms" [19]. As a well-known Belarusian scholar A. G. Tikovenko correctly admits, the uncertainty of legal norms opens the possibility of arbitrariness, infringement of the equality of all before the law and the court, and violation of person's, citizen's and legal entities' rights and legitimate interests [20, p. 27].

The Belarusian unfair competition law is intended for the protection of both individuals and public as a whole. We believe that the potential legal norm, according to which the "pokutne" could be awarded for the purposes related to the support of the Belarusian national culture, would have unjust and even to some extent discriminatory character, since the Belarusian society consists of people of different nationalities,

maintaining, in varying degrees, their traditions, language and culture.

As the Belarusian law-enforcement practice shows, the persons aggrieved by unfair competition acts are

mainly entrepreneurs and commercial organizations not pursuing public goals. In this regard, their interest in making a claim for payment of the money to be awarded not in their favor seems very unlikely.

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