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THE GOOD PRACTICES CLAUSE IN THE "ACT ON COMBATTING UNFAIR COMPETITION OF 16 APRIL 1993" AND IN THE LIGHT OF SELECTED JURISPRUDENCE. THE ETHICAL IMPLICATIONS

KLAUZULA DOBRYCH PRAKTYK ZAWARTA W „USTAWIE O ZWALCZANIU NIEUCZCIWEJ KONKURENCJI" Z DNIA 16 KWIETNIA 1993 R. ORAZ W ŚWIETLE WYBRANEGO ORZECZNICTWA. WYBRANE IMPLIKACJE ETYCZNE

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Abstract: This paper, employing historical-legal methods, presents selected court judgments on the good practices clause in the *Act on Combatting Unfair Competition of 16 April 1993* (*Ustawa o zwalczaniu nieuczciwej konkurencji z 16 kwietnia 1993 r.*) (*Journal of Laws* 1993, No 47, item 211). The term *unfair competition* is used in the different legal categories in the act, which makes interpretation difficult. Each time the court determines the existence of two qualifications: entrepreneurs being in a court dispute conducting economic activity where there may be an infringement or a threat to the economic interests of the other entrepreneur. The innovative approach in this paper is based on what are ethical implications.
Keywords: economic activity, morality, rules of social symbiosis, commercial freedom, commercial honesty

Streszczenie: Artykuł, wykorzystując metodę historyczno-prawną, prezentuje wybrane orzeczenia sądowe odnoszące się do klauzuli dobrych praktyk w *Ustawie o zwalczaniu nieuczciwej konkurencji z 16 kwietnia 1993 r.* Zróżnicowanie używania kategorii terminu *nieuczciwej konkurencji* utrudnia jego interpretację. Każdorazowo sąd w orzeczeniu ustala, czy przedsiębiorcy pozostający w sporze sądowym prowadzą działalność gospodarczą oraz czy naruszenie lub zagrożenie interesów gospodarczych dotyczy drugiego przedsiębiorcy. Nowatorskie ujęcie zagadnienia przejawia się w ukazaniu etycznych implikacji.
Słowa kluczowe: działalność gospodarcza, moralność, zasady symbiozy społecznej, wolność handlowa, uczciwość handlowa

Introduction

The good practices clause first made its appearance in the Polish legal system on 1 May 1808 (Rzeczkowski, 2018, p. 55), with the ingress of the *Code civil des francais* (art. 6 [2-3]; art. 444, 1º [109]; art. 900 [218]; art. 1133 [274]; art. 1172 [283]; art. 1387 [337]; Sobociński, 1965, p. 62; Szonert, 1998, 91-95), introducing art. 69 into the *Ustawa Konstytucyjna* of the Duchy of Warsaw: "Napoleonic Code will be the civil law of the Duchy of Warsaw" (*Constitutional Act of the Duchy of Warsaw of 1807* [*Ustawa konstytucyjna*], 1810; Kallas, 1990, pp. 105-155). Subsequently, controlling legislative powers and the Polish legislator used this term after Poland regained its independence in 1918. The concept of good practices from the German act on combatting unfair competition of 7 June 1909 served as a prototype for the *Act of 2 August 1926 on combatting unfair competition* (*Ustawa z 2 sierpnia 1926 r. o zwalczaniu nieuczciwej konkurencji*) - (*Journal of Laws* 1926, No. 96, item 559). The Polish legislator in art. 6, § 1 contained an exemplary catalogue of hallmarks of a crime, the fulfillment of which would constitute that a given act was considered a crime; in this respect, the Supreme Court issued a judgment (Supreme

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Court, *Judgement* of 8 June 1932, Ref. No. II. K 385/32). This clause also appeared in the *Regulation of the President of the Republic of Poland of 27 October 1933. Code of Obligations* (*Rozporządzenie Prezydenta Rzeczypospolitej z 27 października 1933 r. Kodeks zobowiązań*) - (Korzonek, Rosenblüth, 1936, p. 130; Journal of Laws 1933, No. 82, item 598; Madej, 2017, p. 81) and the *Regulation of the President of the Republic of Poland of 27 June 1934. Commercial Code* (*Rozporządzenie Prezydenta Rzeczypospolitej z 27 czerwca 1934 r. Kodeks handlowy*) - (art. 240, § 2: *Journal of Laws* 1934, No 57, item 502; art. 414: item 502). However, the golden age of the good practices clause ended after 1945, when, because of the socio-political context, the legislator proposed a clause regarding social coexistence. The clause of the rules of social coexistence originates from Soviet law and appeared in Polish law in 1950 in the *Act on General Provisions of the Civil Law of 18 July 1950* (*Ustawa z 18 lipca 1950 r. Przepisy ogólne prawa cywilnego*) - (*Journal of Laws* 1950, No. 34, item 311), and then in the *Act of 23 April 1964 Civil Code* (*Ustawa z 23 kwietnia 1964 r. Kodeks cywilny*) - (*Journal of Laws* 1964, No 16, item 93, hereinafter: KC). Initially, the concept took on a strong ideological tone, both because of its origin and the statement in the regulations that it was about the principles of social coexistence prevailing "in the People's State" and later "in the Polish People's Republic" (art. 5 of the KC). It was only in 1990 that a significant change occurred. The aforementioned reference to art. 5 of the KC was removed and the very concept of the principles of social coexistence began to be interpreted without any ideological references (Pajor, 2009, p. 136). Today, moral assessments expressed by formed conduct norms that regulate the conduct of one person towards another are understood by the principles of social coexistence in the doctrine of civil law. Moral evaluation is the experience of giving approval or disapproval to some human deed because of the extent to which it contributes to the just good of other people (Machnikowski, 2016, p. 15).

Thus, the clause of good practices during the period of the doctrine of central planning was devoid of practical significance in jurisprudence. In 1945, in the Ministry of Justice, with the participation of a small group of scientists, an attempt was made to unify Polish civil law. This was then done by issuing a series of decrees regulating the general part of civil law in 1945-1946 (Radwański, 200, p. 132). Since the socio-economic changes in the 1990s, in the civil legislation, the "rules of social coexistence" is gradually being eliminated and in individual cases being replaced by the good practices clause, and in some cases the „equitability" clause. All these clauses, however, fulfill the same function and have the same meaning. Morality in terms of classical philosophy is a way of behaving or a declared practices of human behavior consistent with a genuinely good state of affairs; at the same time, appealing to this concept of morality is not opposed to the pluralism of views present in literature on the subject. Morality as a recognized and practiced system of values, under public economic law, is a universal system that is a component of the decision-making process both in the public sector and in shaping civic attitudes. Of course, the vision of universal procedural ethics that develops ways of resolving conflicts between culturally diverse social groups sounds optimistic. However, merely conducting talks leading to conflict resolution does not guarantee the agreement of positions, just as establishing rules of communication alone does not replace the ultimate grounds for which a social problem should be resolved in a particular way. Procedural ethics omits a moral assessment of the act carried out taking into account a triple-faceted criterion, i.e., the moral idea in understanding the purpose, the circumstances, and the intentions of the individual. Thus, procedural ethics does not answer the question of the foundation of positive law, and therefore, in this case, an understanding of the good practices clause. In classic Euro-Atlantic culture referring to Plato, Aristotle, Paul of Tarsus, Augustine of Hippo, or Thomas Aquinas, the eternal law ("lex aeterna") existing in God's design is the prototype of every legal and moral norm that human intellect establishes as moral law. Regardless of the ethical foundations developed in Christianity or in the Enlightenment movement, it is undoubtedly clear that outside the Euro-Atlantic civilization, it is difficult to find one common universal moral system on which to build the framework of an acceptable legal system for all citizens (Przesławski, 2015, p. 43; Machnikowski, 2016, p. 18).

Currently, the good practices clause is a special category to the principles of social coexistence, highlighted by economic sense (Supreme Court, *Judgement* of 26 January 2006, Ref. No. II CK 378/05). Consequently, the good practices clause was introduced into legislation, inter alia, to art. 3, § 1, 1° and art. 16, § 1, 1°; § 3 of the *Act on Combatting Unfair Competition of 16 April 1993* (*Ustawa o zwalczaniu nieuczciwej konkurencji z 16 kwietnia 1993 r.*) - (*Journal of*

Laws 1993, No 47, item 211). This provision contains the legal definition of an act of unfair competition including, inter alia, a reference to the blanket clause of good practices, which lacks the statutory definition may cause problems when you attempt to clarify the concept. The purpose of the article is to present interpretative guidelines for the clause of good practices in the judicature in relation to the objective of the act and systemic interpretation (Appellate Court in Kraków, *Judgement* of 23 August 2017, Ref. No. I ACa 411/17; Appellate Court in Lodz, *Judgement* of 6 September 2016, Ref. No. I ACa 907/16; Supreme Court, *Judgement* of 9 October 2019, Ref. No. I NSK 61/18; Supreme Court, *Judgement* of 25 September 2019, Ref. No. I NSK 92/18).

Methodology and theoretical basis

The good practices clause is a kind of blanket clause that can be understood in two ways; first, as a norm arising from a provision authorizing the entity to exercise the right to judgment, ruling or administrative decision support for the indicated non-legal criteria; second, as a vague, non-legal phrase, referred to by the legislator in legal norms (Leszczyński, Moroń, 2013, p. 81). The doctrine expresses the view that a blanket clause signifies an element of a legal article that is an indistinct phrase, for example, an underspecified phrase, containing an open criterion - one that contains elements of a social axiology outside of the legal (Kalisz, 2013, p. 198). The blanket clause reflects an external axiology referring to values, assessments or norms. Simultaneously, regardless of whether or not those values are moral, economic or political, the blanket clause opens up the legal system to an axiology which the legislator considers of value (Szot, 2016, p. 293). This clause does not allow the judge unhindered arbitration, but requires that existing social rules be applied. In practice, the judge settles conflicts based on his own moral intuition. There is no danger in this, as long as the judge's moral sense has been properly shaped by social influences shared by all moral directives. Decisions in individual cases are subject to administrative control (Machnikowski, 2016, p. 17).

The good practices clause, according to the traditional approach, referred to ethical and moral assessments. The judge in a trial rules that a violation or offense against good practices has been committed and his ruling is based on his own discretion, guided by a sense of rectitude of people who think fairly and justly. The good practices are an indication of conduct that exists objectively in the ethical sensibilities of a society. The measure of these ethical requirements is the average moral level appropriate for a decent work and economic life (Żurawik, 2009, p. 39).

The connotations of the term "custom" may be different; etymologically, derived from the Latin: "mos", "moris" - custom, this term has the following meanings: 1) widely adopted, traditional procedure in the circumstances, 2) a practices of conduct, behavior, characteristic for a given person, 3) ethical and moral rules (usually plural) that someone follows (Sokal, 2011). However, it was not a mechanical transference, because the law was not a simple reflex of morality. Thus, each case of the application of the law was a slightly different reflection that must take into account the political, ideological and economic context (Michalik, 2005, p. 387). The term good practice is considered a vague concept and only in specific situations can it be assigned a specific content. Thus, moral and customary norms are applied in business. The concept of the good practices is not commonly used as a concept in the act. They can also be considered part of the concept of principles of the social coexistence and norms of behavior similar to these principles. The good practices clause, with axiological connotations, in some cases replaces the clause of principles of social coexistence in Polish law. The principles of social coexistence refer to the axiological principles proper to society, while the good practices rather relate to human behavior in a specific area, for example, in business. Every field of activity develops its own category of the good practices. Just as it does for other normative general concepts, in advance are doomed to failure attempts to define precisely this notion. The mutual relationship between morality and law is the implication of the hypothesis which assumes that there are bilateral interactions between systems of legal norms and moral norms. Moral norms affect the content of legal norms and their effectiveness, while being able to imply their own internal modifications. In such conditions, the formation of a legal norm in relation to numerous moral and „"moral-related" norms can take place in modern legislative systems by means of incorporating moral norms into the legal system, references to moral norms or evaluative phrases (Kotowska-Lewińska, Kulmaczewski, 2017, p. 317).

However, it cannot be concluded that from the fact of legalization, jurisdiction or codification of moral norms, these norms become part of the legal system, since they belong to a separate normative order. In fact, it is the legal norms that require moral legitimization (Przesławski, 2015, p. 38).

It should be emphasized that "law cannot be a full reflection of morality", because "positive law, especially in a pluralistic system, is always the result of a compromise between various political and social forces playing a role in social life" (Constitutional Tribunal, Judgment of 17 March 1993, Ref. No. W 16/92). That is why "the democratic way of creating law guarantees [...] the implementation of a socially accepted system of values as a source of morally legitimate legal norms" (*Dissenting opinion of judge of the Constitutional Tribunal, Kazimierz Działocha, to the decision of the Constitutional Tribunal of 7 October 1992* [*Zdanie odrębne sędziego Trybunału Konstytucyjnego Kazimierza Działochy do postanowienia Trybunału Konstytucyjnego z 7 października 1992*, Ref. U 1/92, OTK 1992, No. 2, item 38]).

Good practices are in some cases catalogued in the form of ethical codes or good practices relating to economic endeavors, specific professional groups, or types of economic activity. These catalogues play an auxiliary role, because they do not contain a closed catalogue of specific principles, which often, in fact, correspond to principles expressing the interests of individual entrepreneurial groups (Kopaczyńska-Pieczniak, 2016, p. 101).

Economic-functionalism is a dominant factor in explaining the essence of good practices. The doctrine assumes that, "it is not about adhering to good practices [«in abstracto »] (Supreme Court, *Judgement* of 31 May 1933, Ref. No. II K 285/33; Ref. No. II SA 1131/99, LEX, No. 46696), but about the behavior of entrepreneurs in business activities" (Kalisz, 2013: 199). The criterion should not be the views of the average honest person, but assessments aimed at ensuring the smooth functioning of competition through reliable and undistorted rivalry for quality, price and other desired features of the goods or services offered by customers. This contemporary approach began to pave the way in jurisprudence already in the pre-war period. An example might be the settlement of litigation over the validity of the resolutions of general meetings and receivership banks. Certain that neither the sale-purchase contract concluded with the State Treasury nor the resolution of the general meeting was in opposition to good practices, the Supreme Court based its consideration on the results of the hearing, on the basis of which it concluded that the negotiation was generally favorable to the defendant and that it was even in a favorable situation, that members of the management board and the supervisory board who submitted the draft contract for approval to the general meeting, acted in good faith, and in fact it did not favor certain shareholders to the detriment of others and the sale of the enterprise (a cigarette factory) was in the interest of all shareholders, aiming to avoid the State Treasury exercising its tobacco monopoly rights (Supreme Court, *Judgment* of 19 March 1926, Ref. No. C 9/26; Szwaja, 2003, p. 996; Laszczyk, Gajdus, 2012, pp. 27-29).

The authoritative findings of its content are individually carried out by the entity through the application of the law (Szot, 2016, p. 293).

On the other hand, economic and moral criteria, based on the principles of common practice, explain behaviors that can positively affect the functioning of companies, and are tied to an observance of commercial integrity in conducting business activities. The pattern of commercial integrity is currently examined under the title of good practices (Biskup, 2007, pp. 151--161; Kopaczyńska-Pieczniak, 2016, p. 99).

Otherwise, the term good practices is understood in the doctrine:

1) expressions, whose common feature is to appeal to morality,
2) expressions referring to images functioning in society,
3) expressions referring to an abstractly constructed model of perfect competition,
4) expressions referring to actually prevailing customs (Gadek, 2003, 129 and the following pages).

Therefore, contemporary doctrine and the jurisprudence of Polish courts gives the clause of good practices an economic and functional character. The behavior of the entrepreneur in the course of seeking the favor of the customer, relating to the purchase of goods or services, is considered. This criterion should be understood as a determinant of a competitive business: quality, price, and other characteristics of goods or services offered. In assessing the behavior of an entrepreneur, one must observe the good practices criterion (Skubisz, 2016, p. 83).

Results and discussion

In order to establish the relationship between the clause of good practices and morality (Quintus Horatius Flaccus, 2010, p. 90; Kotowska-Lewińska, Kulmaczewski, 2017, p. 314), reference should be made to the ethical values prevailing in society, i.e. those professed by the general public, or, as the Constitutional Tribunal puts it, those values "functioning in society" (Constitutional Tribunal, *Judgment* of 17 October 2000, OTK ZU

2000, No. 7, item 254) or, according to the Supreme Court, those that are "setting general moral standards binding in society" (Supreme Court, *Judgement* of 26 September 2002, Ref. No. III CKN 213/01). The Supreme Court indicated that among moral norms incorporated into the good practices clause was also a ban on the abuse of subjective rights (Supreme Court, *Judgement* of 17 November 2011, Ref. No. III CZP 68/11; *Judgement* of 16 October 2008, Ref. No. III CSK 100/08).

As a consequence, the jurisprudence of the European Court of Human Rights has not developed a coherent position on what behaviors are inconsistent with morality and thus may be banned by signatories of the European Convention on Human Rights (Council of Europe, *European Convention on Human Rights and Fundamental Freedoms*, Protocols: Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177). The Strasbourg Tribunal was limited only to calculating behaviour inconsistent with the morality contained in the European Convention on Human Rights (Podkowik, 2019, p. 38).

In art. 3, § 1 of the *Act on Combatting Unfair Competition of 16 April 1993* (*Ustawa o zwalczaniu nieuczciwej konkurencji z 16 kwietnia 1993 r.*) - (*Journal of Laws* 1993, No 47, item 211), an act of unfair competition is the behavior of the entrepreneur, if they meet the following conditions: 1) the entrepreneur's action is taken in the course of a business activity, or 2) the action is against the law or the good practices, if 3) violates the interests of another entrepreneur - a competitor or a customer (Journal of Laws 1993, No 47, item 211).

There is here the illegality in the "sensu stricto", which is contrary to good practices, and the illegality in the "sensu largo", which is contrary to the positive law (Laszczyk, Gajdus, 2012, p. 25).

Then, on the basis of art. 3 § 1, the jurisprudence has developed unnamed acts of unfair competition: the use of another's trademark reputation (Supreme Court, *Judgement* of 12 October 2005, Ref. No. III CK 160/05; *Judgement* of 20 October 2005, Ref. No. II CK 154/05; *Judgement* of 14 October 2009, Ref. No. V CSK 102/09) and a parasitism by taking over the work result of another entrepreneur (Supreme Court, *Judgement* of 27 February 2009, Ref. No. V CSK 337/08).

However, art. 3, § 2 provides that the act of unfair competition are, in particular: 1) misleading designation of an enterprise, or 2) false or fraudulent indication of the geographical origin of goods or services, or 3) violation of business secrets, or 4) inducing to terminate or not perform the contract, or 5) imitation products, or 6) defamation or unfair praise, or 7) obstruction of access to the market, or 8) bribery of a person holding a public office, or 9) unfair or prohibited advertising, or 10) organizing an avalanche sales system and conducting or organizing activities in a consortium system (Skubisz, 2016, p. 82).

The acts falling within the purpose of art. 3, § 2 can be divided into illegal and contrary to good practices. The criterion of good practices allows to complete the list of unlawful acts and to recognize, in a specific factual state, the qualification of the named act of unfair competition as permitted. It is essential to establish the meaning of the term good practices, which is not defined in the act (Skubisz, 2016, p. 83).

However, the expression good practices in art. 16, § 3 should be understood as a collective definition of all the required conditions for allowing the comparison in the advertisement by an entrepreneur of his offer with a market proposal of another entrepreneur (Skubisz, 2016, p. 85).

The doctrine relating to the *Act on Combatting Unfair Competition of 16 April 1993* (*Ustawa o zwalczaniu nieuczciwej konkurencji z 16 kwietnia 1993 r.*) - (Journal of Laws 1993, No 47, item 211) indicates that good practices are moral norms and customary used in business, which can be violated by even one who does not know. It seems that a violation of good practices can be considered, for example, failure to comply with ethical code edited for the various sectors of individual business sectors (Kunkiel-Kryńska, Working paper).

The concept of good practices takes a specific normative meaning only in specific situations, and so the individualization of a legal norm. Therefore, when looking for the content of the concept of good practices and determining whether a specific act constitutes a breach, one should take into account the entirety of the circumstances of a given case, in particular the purpose, measures used and consequences of the actions taken (Supreme Court, *Judgement* of 26 September 2002, Ref. No. III CKN 213/01; Appellate Court in Lodz, *Judgement* of 6 September 2016, Ref. No. I ACa 907/16). Whether an act of unfair competition is contrary to good practices, decide all the circumstances, especially the goal, the means used and the consequences (Supreme Court, *Judgement* of 9 October 2019, Ref. No. I NSK 61/18).

The indeterminate phrase of the good practices, except art. 3, § 1°, also occurs in art. 16, § 1, 1°, which prohibits advertising contrary to the

law, good practices and offending human dignity, and in art. 16, § 3, in which comparative advertising is allowed, if it would be in accordance with good practices; this causes inconsistency (Skubisz, 2016: 84).

The phrases 'good practices' and 'human dignity' in art. 16, § 1, 1° should be understood as the moral principles in force in a society. The criterion of good practice allows for the completion of the list of unlawful market acts and for the correction, in the actual state, od the qualification of the named act of unfair competition as permitted (Skubisz, 2016, p. 82).

Conclusion

The use of the same term good practices in regard to the different legal categories in one legal act (art. 3, § 1; art. 16, § 1, 1° and art. 16, § 3) of the *Act on Combatting Unfair Competition of 16 April 1993* (*Ustawa o zwalczaniu nieuczciwej konkurencji z 16 kwietnia 1993 r.*) - (Journal of Laws 1993, No 47, item 211) raises legitimate doubts from the point of view of the methodology and the "ratio legis". However, the postulate of uniformity of the blanket clause of good practices, due to its imperfection, cannot be consistently implemented. The term good practices used in art. 16, § 1, 1° and art. 16, § 3 could be substituted by equivalent terms, without detriment to the act. In the case of a contradiction between the unnamed act of unfair competition from art. 3 § 1 and the law or good practices, each time it is necessary to establish the existence in a specific state of two other qualifications, i.e.: both entities conduct business activity and violate or threaten the economic interests of the entity. In the case of acts stipulated in art. 3, § 2 the realization of the constitutive elements called an act of unfair competition decides that the entrepreneur's action is considered an act of unfair competition (Skubisz, 2016, p. 85).

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