Ph.D. thesis
prepared under supervision of
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'Slotting fees' - collecting fees other than commercial margins for accepting goods for sale as acts of unfair competition under Article 15 s. 1 ss. 4 of the Combating Unfair Competition Act

- ABSTRACT -

According to art. 15 s. 1 ss. 4 of the Combating Unfair Competition Act of 16 April 1993 (hereinafter referred to as the "CUCA") it is an act of unfair competition to restrict market access for other entrepreneurs, in particular through the collection of fees other than commercial margins for accepting goods for sale. The introduction of this provision to the Act by way of amendment of 5 July 2002 was motivated by the desire to eliminate the practice of collecting of the so called "slotting fees", i.e. financial burdens imposed by retailers on their suppliers in exchange for the opportunity to establish and continue commercial cooperation. Since its entry into force, Art. 15 s. 1 ss. 4 of the CUCA has been widely used by the suppliers who demand from retailers – on its basis – reimbursement of the fees that they had paid them during their collaboration. The number of such cases before the courts in recent years is significant - at the beginning of 2013, there were more than 300 cases, the total value of which was estimated at about PLN 400 million.

Most often the dues at issue in cases under Art. 15 s. 1 ss. 4 of CUCA – the "slotting fees" mentioned in the title – are payments stipulated in trade agreements and collected from the supplier by the retailer for performance of specific, agreed-upon services. These are usually logistics or advertising services that may consist in advertising the supplier's products in-store or in the retailer's promotional brochures. The category of the so-called "slotting fees" also includes the amounts by which, through the application of discounts, rebates, bonuses and other similar mechanisms, the sale price at which the retailer buys goods is lowered by the seller. Suppliers' actions against retailers for reimbursement of such payments are effective in an overwhelming majority of cases. It is so not only where claims are clearly justified, i.e. where, for example, retailer requested exclusive supply, the payment of the "slotting fees" was imposed

on the supplier, and the corresponding services were not rendered, but also in cases where the retailer did not restrict the supplier's possibility of disposing of its goods through other distribution channels, the agreed-upon services were actually rendered to the supplier (also with its knowledge and cooperation) and earned it a specific economic benefit, while the price reduction provided for in the agreement was known in advance. It is so because according to the interpretation of Art. 15 s. 1 ss. 4 of CUCA adopted in the case law and described in detail in this paper, the said provision – despite its rather clear wording – prohibits retailers from rendering any paid services to their suppliers, in particular advertising services consisting in marketing support of the sale of goods coming from them in the distribution channel created by the retailer (except for transport services whose subject are the goods prior to their introduction into the distribution channel, that is, prior to transferring their property to the retailer) and the contractual modification of sales price of the goods provided by the suppliers through the use of rebates, bonuses, discounts and other similar mechanisms of its determination.

It is impossible to question the importance for the operation of large-format trade (as well as retail trade in general) of the problem that led to the introduction to the legal system of Art. 15 s. 1 ss. 4 of CUCA. Despite this, the wording of the said provision, and above all, its broad interpretation adopted in the case law, have for many years raised fundamental reservations of the representatives of the doctrine. It is so mainly because the wording of Art. 15 s. 1 ss. 4 of CUCA contains internal contradictions, and its interpretation is based on a number of controversial factual assumptions and normative structures, which are not denominated therein. This paper is also an expression of such criticism. Its considerations are structured in the following way. After the introduction, the second chapter describes the legislative process that led to the introduction of Art. 15 s. 1 ss. 4 of CUCA into the legal system. The third chapter presents the thesis the defense of which is the subject of this paper. This thesis consists of two parts. Firstly, interpretation of Art. 15 s. 1 ss. 4 of CUCA adopted in the currently dominant case law of the common courts and the Supreme Court is described in detail. Secondly, the critical evaluation of such interpretation is presented, both in general, i.e. regarding the understanding of the scope of the prohibition contained in Art. 15 s. 1 ss. 4 of CUCA, as well as in relation to the various conditions for its use and the detailed objectives, criteria and specific normative structures, discovered and used by the case law under this provision. The latter part of the work is devoted to the verification of the adopted thesis and is divided into three parts. The first and fundamental part analyzes the legal and factual issues on the basis of Art. 15 s. 1 ss. 4 of CUCA (Chapter Four). The second and third part, which are much less extensive,

describe the legal solutions adopted in the European Union and some Western countries in relation to the problem, which is the subject matter of this provision (Chapter Five), and effects on the market (reception) of its interpretation adopted in the jurisprudence of the common courts and the Supreme Court (Chapter Six).

The fourth chapter is further divided into two main parts – a general and a specific one. As part of the general considerations, Chapter 4.2.2. and 4.2.3. respectively, are devoted to the analysis of prerequisites of "collecting charges other than commercial margins for accepting goods for sale" and "restricting access to the market", including the meaning of the concepts used therein. In Chapter 4.2.4. the subject matter of considerations will be whether and when the scope of conditions of an act of unfair competition provided for in Art. 15 s. 1 ss. 4 of CUCA should also include the conditions provided for in Art. 3. s. 1 of the Act. Chapter 4.2.5. is devoted to the issue of equivalence of benefits as a prerequisite allowing to determine whether a given fee is a fee charged for accepting goods for sale or not. Chapters 4.2.6. and 4.2.7. deal with specific normative structures developed by the case law in cases under Art. 15 s. 1 ss. 4 of CUCA - the concept of the so-called "stock-related services" and exclusion of the admissibility of determining the price of goods in relations of retailers with their suppliers based on the percentage of turnover in parallel purchase-sale transactions. Chapter 4.2.8. discusses the extent of the obligation to repay unjustified benefits in case of claims on the basis of Art. 18 s. 1 ss. 5 in conjunction with Art. 15 s. 1 point 4 of CUCA. The next two chapters - 4.2.9. and 4.2.10. briefly describe the issue of limitation of such claims and the rules for calculating interest. Considerations of the general part finish in Chapter 4.2.11., devoted to specific procedural issues in the proceedings under Art. 15 s. 1 ss. 4 of CUCA, with particular emphasis on legal presumptions and the distribution of the burden of proof. Lastly, the specific part describes how the concepts of interpretation of Art. 15 s. 1 ss. 4 of CUCA, adopted conceptual categories and views of the case law are applicable in relation to the basic groups of benefits considered as prohibited fees for accepting goods for sale, i.e. – to put it more generally – advertising and transport services as well as discounts. Each chapter contains a summary comprising postulates regarding the correct - in the opinion of the author - interpretation and application of Art. 15 s. 1 ss. 4 of CUCA for each of the groups of issues discussed.

The considerations comprised in this paper lead to the conclusion that the dominant interpretation of Art. 15 s. 1 ss. 4 of CUCA adopted in the jurisprudence of common courts and the Supreme Court is significantly flawed, both in general, i.e. prohibition such as described

earlier cannot be inferred from the content of this provision, as well as in relation to the various conditions for its use and the detailed assumptions applied by the courts in deciding cases on its grounds. The adopted interpretation is – in author's view – an example of a faulty application of the historical, systemic, grammatical, teleological and functional method, resulting in a far-reaching confusion as to the actual normative content of the analyzed provision as well as a complete isolation of the meaning of the concepts it uses in relation to the meaning of these same concepts used in other provisions of CUCA, public competition law and civil law. These findings lead to the conclusion that it is necessary to review the adopted interpretation of Art 15 s. 1 ss. 4 of CUCA or to amend it in the direction outlined in this paper, corresponding to the European Commission's proposals contained in the Green Paper on unfair trading practices in the business to business food and non-food supply chain of 31 January 2013.

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