

Charging slotting fees in Poland. Need of legal amendments or an adjustment in legal interpretation? (From the Editor-in-Chief)

Articles

Maciej Bernatt, Collection of charges other than commercial margins for accepting goods for sale

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Summary: Discussed in this conference paper are the main problems concerning Polish legislation on slotting fees (Article 15(1)(4) of the Combating Unfair Competition Act). Attention is drawn to the approach applied by the jurisprudence of civil courts. It is shown that courts fail to study whether the collection of slotting fees actually impeded others’ access to the market. The paper closes with suggested amendments of the Combating Unfair Competition Act.

Key words: slotting fees, unfair competition, unfair commercial practices.

Paweł Kamela, Interpretation of Article 15(1)(4) of the Combating Unfair Competition Act: applying the approach of Maciej Zieliński

Summary: Proper interpretation of Article 15(1)(4) of the Combating Unfair Competition Act leads to the conclusion that it is the introduction of impediments to market access that is forbidden thereby. An analysis of the provisions of the Act proves that a mere ‘collection of charges other than commercial margins’ for accepting goods for sale is not a sufficient premise to apply its sanctions. The interpretation of this provision has a big influence on the scope and course of evidentiary proceedings in court trials on such cases.

Key words: Article 15(1)(4) of the Combating Unfair Competition Act; slotting fees; introduction of market entry barriers; interpretation of the law; the approach of Maciej Zieliński.

Małgorzata Modzelewska de Raad, Pola Karolczyk, „Slotting allowances” – between the private and the public law regime – a policy debate

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Summary: The purpose of this paper is to present arguments supporting a change or removal of current Polish legislation on slotting allowances. Existing jurisprudence shows that Polish courts tend to approach slotting allowances in an overly simplistic manner treating, typically, as a slotting allowance every charge other than the payment of the price for the goods. This approach eliminates a wide array of services which could otherwise be offered by large supermarkets to their suppliers. Furthermore, Polish courts are currently not obliged to demonstrate that a given payment charged by a supermarket can restrict market access. Applicable legal provisions cover thus numerous instances where slotting allowances do not have an appreciable impact on competition.

It is argued here that slotting allowances should be subject to antitrust enforcement and that the Competition Authority should be empowered to oversee them under the existing Article 9 of the Polish Competition Act. The Competition Authority is better placed to conduct a proper economic analysis of the market effects of slotting allowances and to focus its intervention on instances where they can create an actual threat to competition. The proposed amendment would put the Polish legal system in line with the European Commission's guidance on slotting allowances.

Key words: unfair competition, competition law regime, slotting allowances, market entry barriers.

Dominik Wolski, Selected issues on slotting allowances and fees in light of existing jurisprudence

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Summary: Slotting allowances or slotting fees still generate many doubts and disputes. On the basis on existing jurisprudence, discussed here are the most important problems which appeared in Poland in this field. Mentioned among them are: limits of the freedom of contract in the context of Article 15(1)(4) of the Combating Unfair Competition Act; symptoms of market access limitation and the character of this prerequisite in jurisprudence; burden of proof; equivalency of benefits provided by retail chains to cooperating entrepreneurs; legal character of rebates and bonuses applied in relations between suppliers and retail chains. These issues are discussed in light of doctrinal views and business practice. This rather wide treatment of each of these problems makes it possible to comment on the noted judgments and the correctness of their final verdict.

The paper does not fail to provide a critical voice also wherever the jurisprudential direction taken in the analyzed cases demands a rethink and a possible revision.

Key words: unfair competition act, slotting allowances and fees, freedom of contract, burden of proof, limitation of market access, presumption, equivalency.

Grzegorz Kaniecki, Slotting fees from the perspective of an economic analysis of the law

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Summary: The aim of this paper is to look at slotting (listing) fees as defined in Article 15(1)(4) of the Combating Unfair Competition Act from the perspective of an economical analysis. The paper calls for a more in-depth interpretation of the issues by courts that would cover the overall business relations between the retailers and the suppliers. Presented is the modern way of cooperation between suppliers and retailers structured as vertically integrated marketing (supply) chains where the parties have to agree to key parameters of long term cooperation such as: logistics, ways and methods of promotions, assortments as well as timing of listing of new products. A business and economic perspective is applied here to the analysis of slotting fees (listing fees) seeing as any formalistic interpretation of market practices without recourse to ‘economical thinking’ would lead to market failures and, in consequence, lead to a reduction in consumer welfare.

Key words: listing fees, retailers and suppliers, economical approach, economical analyses of law.

Paweł Węc, Admissibility of bonuses, rebates or discounts under the provisions of Article 15(1)(4) of the Combating Unfair Competition Act

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Summary: This conference paper presents a legal analysis of the prohibition to charge suppliers fees other than a commercial margin for accepting goods for sale in accordance with the provisions of the Combating Unfair Competition Act, judgments of the Supreme Court, general jurisprudence and legal literature. Considered in particular is the admissibility of the use by retail chains of different categories of bonuses, rebates or discounts in their relations with suppliers.

Key words: charges other than commercial margins for accepting goods for sale; commercial margin; bonuses, rebates and discounts

Cezary Banasiński, The concept of benefit as the evaluation parameter for equivalency in the application of Article 15(1)(4) of the Combating Unfair Competition Act

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Summary: Emphasized here is the need to use an economic approach to the application of Article 15(1)(4) of the Combating Unfair Competition Act. A legal analysis of the terms used therein and its literal wording cannot form the only basis of its interpretation which should also include market aspects of its application. The notion of benefits should be used as a instruments to assess 'equivalence of benefits' under contracts concluded by large-format stores with their suppliers. The concept of benefits is important because it is acceptable to collect slotting fees if it is possible to prove that suppliers gain a measurable benefit for the fee they pay. The *ratio legis* of Article 15(1)(4) of the Combating Unfair Competition Act can under no circumstances be brought down to the order to eliminate agreements other than those on the acceptance of goods for sale such as those on goods transport or on marketing, consulting or logistic services. The analysis of equivalence of benefits should therefore include not only a simple comparison of costs borne by a retail chain on an advertising campaign with the hypothetical costs that a supplier would have to bear if it was to conduct it on its own to achieve a comparative sales volume. Considered in such an analysis should also be benefits impossible to estimate in terms of quantity such as, for example, possible future cooperation between the supplier and a large-format retail chain. Assessing respective benefits for suppliers and recipients of goods within the analysis of their contract relations in light of Article 15(1)(4) of the Combating Unfair Competition Act makes it possible to arrive at a realistic market evaluation of equivalence of benefits.

Key words: Combating Unfair Competition Act, Article 15(1)(4) Combating Unfair Competition Act, so-called slotting fees, margin, market, market access, economic approach, freedom of contract, equivalent benefit, large-format stores.

Maciej Fornalczyk, Economic grounds for the use of slotting fees and market elimination allegedly done by retail chains (large-format shops)

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- II. Economic justification of slotting fees
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Summary: It is truly necessary to tilt the approach that has been applied nowadays towards Article 15(1)(4) of the Combating Unfair Competition Act because the charges collected by retail chains (large-format stores) constitute usually an integral part of the value chain of the given

product as well as a reflection of the price policy of such store. This fact suggests that such charges cannot be automatically deemed as an additional and unfair income generated by the purchaser (retail chain) from the seller. Charges collected from sellers (which can look dubious at first glance) can be nothing more than a retail chain's remuneration for services rendered to the supplier. If those services are connected to the value chain and the 'slotting fees' cover costs of managing and selling acquired stock (direct and indirect costs), then the retail-chain does not impose any illegal charges.

It should also be noted that even if a retail-chain plays a significant role as a commercial partner, it cannot be seen as an unavoidable link between the producer (importer) and customers. If that was indeed so then every action taken by such retail chain would be subject to an antitrust analysis. Going down this path, it would be necessary to verify the actual legalistic fundamentalism in favour of a more economic approach (based on free market paradigm). One must note that economics is used more extensively nowadays in antitrust proceedings, contributing substantially thereto.

Key words: sells margin, margin, acquisition price, product value chain, complementary services, economic usage, budgetary restraints, consumer's choice, direct costs, indirect costs, market definition, market access impediment.

Lesław Kański, Types and forms of payments' settlements between suppliers and commercial companies in light of jurisprudence

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Summary: This paper focuses on various types of slotting fees used in commercial transactions. Criticized are jurisprudential developments (especially those deriving from the Supreme Court) extending the use of the notion of slotting fees to various kinds of payments made by suppliers to buyers. Presented also are the relations between suppliers and wholesalers and retailers in negotiations and in product promotions. Finally, the paper differentiates between fair and unfair slotting fees and suggests that only an amendment to the present wording of Article 15(1)(4) of the Combating Unfair Competition Act can break the present jurisprudential line.

Key words: slotting fees, rebate, franchising network, marketing and promotional services.

Jarosław Sroczyński, Retroactive rebates and ‘slot allowances’: the need for a rational approach

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Summary: The article discusses the jurisprudential qualification of rebates applied by commercial networks in connection with future turnover (retroactive turnover rebates) as so called ‘slot allowances’. Article 15(1)(4) of the Combating Unfair Competition Act is a provision which requires the interpretation of various economical concepts – a task frequently neglected in court proceedings. The above legal provision performs, without any statutory background, the function of a price regulator when applied to retroactive rebates, in the exclusive interest of small suppliers. This predominant court interpretation (visibly of a ‘social” nature) may create an obstacle for the development of typical market-economy mechanisms of price setting. In the long run, this situation will adversely affect the benefits of purchasers, including consumers, which should be protected pursuant to Article 1 of the Combating Unfair Competition Act. As a result, there is at least a strong need for a rationalization of the interpretation of Article 15(1)(4) of the Combating Unfair Competition Act, if not for an actual legislative initiative to amend this provision.

Key words: act of unfair competition, slot allowances, retroactive rebate, financial bonus, rebates, foreclosure of market access

Varia

List of judgements

Basic Bibliography

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Contents, Summaries and Key words