

## POLAND



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<b>1. The Issue:</b>	Dishonest advertising, advertising in breach of good practice
<b>The Parties:</b>	Federation of Consumers v. "Clou" Spółka z o.o.
<b>Place:</b>	The Court of Appeal in Gdańsk, case file no: I ACr 839/96
<b>Date:</b>	November 11, 1996
<b>Facts and judgment of the court:</b>	<p>On November 6, 1996, the Court of Appeal in Gdańsk, having examined the claims filed by the Federation of Consumers with its registered seat in Warsaw, against "Clou" Sp. z o.o. for prohibition of unfair competition acts, i.e. dishonest advertising, as a result of the appeal of the plaintiff against the verdict of the Regional Court in Gdańsk dated May 30, 1996, reversed the appealed verdict and transferred the case to the Regional Court in Gdańsk in order to re-examine the case.</p> <p>By the appealed verdict the Regional Court in Gdańsk dismissed the claims filed the Federation of Consumers, demanding that "Clou" refrain from the dishonest advertising.</p> <p>The mail-order company trading under the name "Clou", in order to promote its activity and products, provided potential customers with advertising forms and information regarding the contests organized by Clou. As soon as Clou received the order placed by the customer, it registered the personal data of the customer in its computer database. Each customer was provided with a control number, which allowed him/her to take part in lotteries named "Prize of the month" and "Prize of the year". The defendant's leaflets were clear and readable, however information regarding the prize in the amount of 30,000 PLN were less clear and only a careful analysis of the contents allowed one to notice that the customers' applications allowed them only to take part in the drawing of the prize, and not to obtain the prize together with the ordered goods.</p> <p>The Federation of Consumers received a large number of complaints regarding the activity of the defendant.</p> <p>The first instance court took Article 16 of the Act of April 16, 1993 on suppression of unfair competition as a legal ground of its verdict. The court stated that the advertisement of the defendant, in the part regarding the information on the "Prize of the year", was not dishonest, due to the fact that it was true in the sense that careful reading of the leaflet allowed one to realize that the customers to whom it was addressed did not acquire the right to the prize, but merely were allowed to take part in the drawing of the prize. The court did not examine the activity of the defendant in terms of good practice. In the opinion of the Court of Appeal, the omission</p>

	in the appealed verdict of the issues related to good practice meant that the mentioned verdict infringed the law, in particular Article 16 of the Act on suppression of unfair competition.
<b>Comments:</b>	In the opinion of the Court of Appeal, a dishonest advertisement (including the advertisement in breach of the good practice) is an advertisement which by the use of the gullibility of the addressees justified by the circumstances and the average inability to associate facts and draw a conclusion on the basis of the presented text which sets forth the statements desired by the advertiser, gives the average addressee the impression that some particular facts exist (when in fact they do not) and as a result leads to the addressee feeling that he/she has been let down, deceived or slighted. In conclusion, the placement of true information in the advertisement does not mean that the advertisement is honest and in compliance with good practice.

<b>2. The Issue:</b>	Admissibility of the cigarettes promotion lottery
<b>The Parties:</b>	P.M. Polska S.A. and the Minister of Finance
<b>Place:</b>	The Supreme Administrative Court in Warsaw, case file no: II SA 1016/00
<b>Date:</b>	April 4, 2001
<b>Facts and judgment of the court:</b>	<p>Company P. M. Polska S.A. filed an application with the Minister of Finance for permission to organize a promotional lottery between February 1, 2000 and July 12, 2000. The aim of the lottery was to promote the cigarettes produced by this company. The company intended to promote the goods, among others, in the periodical that should be treated as belonging to the youth press, under the name "M".</p> <p>By the decision dated January 5, 2000, the Minister of Finance rejected the application on the basis of Article 24 Section 1 of the Act of July 29, 1992 on lottery games and reciprocal bets. As the legal basis of its decision the Minister gave Article 8 Section 1 in conjunction with the Article 2 Section 7 of the Act on November 9, 1995 on protection of health from the results of nicotine and the use of nicotine products. Article 8 Section 1 prohibits the promotion and advertisement of nicotine products. The lottery constitutes this kind of a promotion. As a result of the party's application, the Minister of Finance re-examined the case, and on February 17, 2000 decided to uphold the decision.</p> <p>P.M. S.A. filed an appeal with the Supreme Administrative Court against both above-mentioned decisions. In the appeal, P.M. SA applied for them to be overturned on the grounds that they were issued in breach of Article 8 Section 1 Item 2 in conjunction with Article 2 Section 7 of the Act on protection of health from the results of nicotine and the use of nicotine products, and the Article 7 of the Code of Administrative Procedure by inexact explanation of facts (passing over the circumstances that the character of the participation in the lottery was not public – personal correspondence).</p> <p>The Supreme Administrative Court dismissed the appeal. In the justification of its verdict the court stated that in accordance with the Article 1 of the Act on protection of health from the results of nicotine and the use of nicotine products, the administrative government departments are</p>

	obliged to undertake actions aimed at protection of health from the results of the use of nicotine products. Moreover, each promotion and advertisement shall be treated as public activity, as it is addressed to the large number of addressees and it is aimed at convincing them to purchase nicotine products.
<b>Comments:</b>	The general prohibition on cigarettes and nicotine product advertisement covers the prohibition of cigarette promotion lotteries as well.

<b>3. The Issue:</b>	Prohibition of advertising and promotion of the products taking advantage of similarity to alcohol beverages
<b>The Parties:</b>	The Polish Confederation of Private Employers
<b>Place:</b>	The Constitutional Tribunal, case file no: K 2/02
<b>Date:</b>	January 23, 2003
<b>Facts and judgment of the court:</b>	<p>The Polish Confederation of Private Employers filed a motion with the Constitutional Tribunal for a declaration that the provisions of Article 13<sup>1</sup> Section 3 and 4 of the Act of October 26, 1982 on education in sobriety and suppression of alcoholism and Article 45<sup>2</sup> of this Act that includes the penal provisions that are incompatible with the Constitution. Article 13<sup>1</sup> Section 3 prohibits advertising and promotion of the products and services, whose name, trademark, graphic shape or packaging takes advantage of a similarity to or is identical to the mark of an alcohol beverage or any other symbol objectively related to an alcohol beverage. Section 4 prohibits the promotion of business entities and other entities which use in the advertisement image the name, the trademark, the graphic shape or packaging related to an alcohol beverage, its producer or distributor. In the opinion of the Confederation, the appealed provisions infringed the following constitutional rules: the specification of the penal provisions, the protection of property, the freedom of business activity and the equality to the provisions of law. Moreover Article 13<sup>1</sup> Section 3 and 4 and Article 45<sup>2</sup> infringed Article 10 of the Convention for the protection of human rights and fundamental freedoms.</p> <p>In its motion, the Confederation claimed that the prohibition on advertisement and promotion of products and services specified in the Article 13<sup>1</sup> Section 3 and the prohibition of advertisement and promotion of the business entities specified in the Article 13<sup>1</sup> Section 4 restricts the right to the use of the trademark to the extent to which in fact, as a result, is tantamount to the deprivation of the right to the trademark. This is in breach of Article 21 of the Constitution. By restricting the freedom of the advertising and promotion of the goods and services, the provisions of Article 13<sup>1</sup> interfered in the freedom of business activity. The Confederation stated that the prohibition on the advertisement of non-alcoholic beverages infringes the freedom of commercial speech, and as a result infringes Article 10 of the Convention for the protection of human rights and fundamental freedoms.</p> <p>The Constitutional Tribunal stated that Article 13<sup>1</sup> Section 3 and 4 of the Act on education in sobriety and suppression of alcoholism - regarded as provisions which do not prohibit advertising and promotion taking advantage of the advertising image which is accidentally similar to the advertising image appropriate for the products or alcohol beverages -</p>

	<p>does not infringe Article 20, 21, 22, 31 Section 3, Article 32 and Article 64 of the Constitution and Article 10 of the Convention for the protection of human rights and fundamental freedoms. Moreover, Article 45<sup>2</sup> of this Act in conjunction with Article 13<sup>1</sup> Section 3 and 4 in the meaning mentioned above does not infringe Article 2 or Article 42 Section 1 of the Constitution. The Constitutional Tribunal stated that Article 13<sup>1</sup> Section 3 and 4 to the extent that it applies to the entities which initiated the activities described in the provisions after the appealed provisions came into force does not infringe Article 2 and 64 of the Constitution.</p>
<b>Comments:</b>	<p>In the opinion of the Constitutional Tribunal, the appealed provisions do not apply to the entity that in the advertisement of a different product uses an advertising image accidentally identical, similar or related to the alcohol beverage or its producer. In the opinion of the Tribunal such person does not commit a crime.</p> <p>The Constitutional Tribunal ruled that the appealed provisions restrict the constitutional freedom of business activity proportionally by taking into consideration the general interest, i.e. protection of public health.</p> <p>Regarding the restriction of the rights to the trademark, the Constitutional Tribunal did not agree with the opinion of the Confederation that the appealed provisions are aimed at depriving the entrepreneurs of their rights to the trademark. The Constitutional Tribunal stated that the rights to the trademark are not connected only with its advertising function and that the trademark may be still used by the entitled person in order to distinguish the products. This last standpoint of the Constitutional Tribunal seems to be controversial.</p>

<b>4. The Issue:</b>	Advertising misleading the consumers
<b>The Parties:</b>	U.(...)D.(...) Inc – Sp. z o.o. v. D.(...)E.(...)P.(...) Sp. z o.o.
<b>Place:</b>	The Supreme Court of the Republic of Poland, case file no: I CKN 52/96
<b>Date:</b>	January 14, 1997
<b>Facts and judgment of the court:</b>	<p>In June 1992 the plaintiff U.(...)D.(...) Inc., Sp. z.o.o. and D(...)H.(...)GmbH with its registered seat in Frankfurt – commercial agent of the concern trading under the name D. (...) with its seat in Europe – concluded a settlement by which the company D.(...) H.(...) GmbH confirmed that the products D.(...) E.(...) C.(...), which used to be sold to the plaintiff under this trademark since 1992 will not be sold in Poland without the prior consent of the plaintiff within the following 2 years, under the condition that the plaintiff in the first year will make an order for the total value of 3,000,000 USD and 10 % larger order in the second year. The plaintiff fulfilled that condition. In 1993 the defendant was registered in the commercial register, as the limited liability company trading under the name D.(...) E.(...) P.(...). D.(...) E.(...) C.(...) Ltd with its seat in Korea – the producer of electronic devices in the scope of the concern D.(...) – was its only shareholder. In accordance with the decision of the Management Board of the mentioned shareholder, the defendant gained exclusive rights to distribute audio-video and electronic devices produced by D.(...)E.(...)C.(...) Ltd. Thus, the defendant placed in the periodic "Life Video" and the newspaper "Gazeta Wyborcza – Gazeta Telewizyjna" information regarding the equipment produced by D.(...)E.(...)C., and to</p>

the effect that the defendant is the exclusive distributor of this equipment in Poland;

The plaintiff filed for: a prohibition on the defendant from further advertising of the company as the exclusive distributor of equipment produced by D., obliging the defendant to remove the consequences of its advertisement within the territory of Poland and to place a press corrective statement and adjudication of the compensation. As the legal grounds the plaintiff invoked the provisions of Act on suppression of unfair competition, claiming that the promotional activity of the defendant, presenting it as the exclusive distributor of the equipment produced by D.(...) within the territory of Poland, undermines the credibility of the plaintiff as the distributor of mentioned equipment. The Plaintiff cited the agreement concluded by it and D.(...) H.(...)GmbH in Frankfurt, which guaranteed it the exclusive rights to the equipment delivered by the contracting party.

In 1996 the Regional Court dismissed the claim regarding the plaintiff's demand that the defendant be ordered to place the press corrective statement in the form to be determined in the course of the proceedings. The court stated that under the settlement dated June 1992 the plaintiff is entitled only to the sale of the equipment produced by D.(...) in Poland and the company under the name D.(...) H.(...)GmbH agreed not to sell such devices to any others entities in Poland. The German company had no right to entitle, in the name of concern D. (...), the plaintiff to be the exclusive distributor. Such conclusion follows from the statement of the President of the Management Board D.(...) E.(...) C.(...) Ltd., which was not challenged by the plaintiff. The Court of Appeal has upheld this verdict.

The plaintiff filed a cassation against the verdict of the Court of Appeal. In the cassation the plaintiff claimed that the court breached the provisions of law by a wrong interpretation of a declaration of will (Article 65 of the Polish Civil Code), by the assumption that the plaintiff was only the seller and not the distributor of the goods produced by D.(...), and that the court breached Article 16 Section 1 Item 2 Act of April 16, 1993 on suppression of unfair competition by the assumption that the advertising activity of the defendant did not constitute the act of unfair competition and did not infringe the rights of the plaintiff.

In the opinion of the Supreme Court, the cassation could not be allowed. The courts that resolved the case correctly interpreted the provisions of the settlement dated June 1992 concluded between the plaintiff and the company trading under the name D.(...) H.(...)GmbH with its seat in Frankfurt. The content of the settlement cannot lead one to the conclusion that D.(...) H.(...)GmbH acted on behalf of D.(...)E.(...)C.(...), the producer of the D. products, which gave the plaintiff the right to the exclusive distribution of the equipment, excluding the right of the producer. The settlement concluded between D.(...)H.(...)GmbH and the plaintiff did not include provisions typical for contracts on distribution. In the opinion of the court the allegation concerning an act of unfair competition with regard to advertising was erroneous as well. The Supreme Court stated that the concept of advertisement was not

	<p>defined by the Act. However, it shall be noted that the doctrine briefly defined the concept of advertisement as the "dissemination of information about services and goods aimed at influencing demand". In addition, the intention to evoke a particular reaction on the part of customers (the addressees of the advertisement) constitutes the substantial element of the advertisement. The main criterion that shall be taken into consideration in order to establish if in a particular case such intention existed shall be the opinion of the average consumer. Such opinion of the customer should reveal if he treated such transmission as the encouragement to the purchase of such goods or services. The message addressed to the potential purchaser should concern the goods or services that are offered. Information included in such message that refers to the company that offers goods or services is secondary, and remains beyond the scope of the concept of "advertisement". This is confirmed by Article 14 of the Act on suppression of unfair competition, which consists in an act on unfair competition in the form of dissemination of untrue or misleading information about one's own or another business entity or enterprise in order to benefit from it or to cause damage. In the circumstances of the examined case, i.e. in the situation in which the defendant disseminated information that it is the exclusive distributor of particular goods, only the infringement of the Article 14 of the Act on suppression of unfair competition may be considered.</p> <p>In the opinion of the Supreme Court, the activity of the defendant did not constitute advertising, and so all the more did not constitute an act of unfair competition in the scope of advertising. The allegation is completely mistaken concerning the infringement of Article 16 Section 1 Item 2 of the Act on suppression of unfair competition, according to which an act of unfair competition in advertising is advertising which misleads the customer and thus potentially influences his decision as regards acquiring goods or services.</p>
<b>Comments:</b>	<p>The verdict of the Supreme Court is worth attention, amongst others, due to the fact that it stresses the difference between advertisement and some particular forms of information. The dissemination by the business entity of the information that it is the exclusive distributor of particular goods does not constitute the act of the unfair competition with regards to advertising, in particular advertising misleading the consumers. (Article 16 Section 1 Item 2 of the Act on suppression of unfair competition).</p>

<b>5. The Issue:</b>	The advertising of beer, indirect advertising, advertising in breach of good practice.
<b>The Matter:</b>	Okocim Brewery
<b>Place:</b>	The Supreme Court of Republic of Poland, case file no: III CKN 213/01
<b>Date:</b>	September 26, 2002
<b>Facts and judgment of the court:</b>	<p>Due to the prohibition on the advertisement of alcoholic beer, Okocim Brewery used to advertise non-alcoholic beer. The advertised non-alcoholic beer had the same name, packaging, label (except for a small postscript "non-alcoholic beer") as the alcoholic beer. Moreover, the commercials regarding non-alcoholic beer presented situations typical for the drinking of alcoholic beer.</p>

	<p>The Supreme Court decided that such advertisement constituted indirect advertising – Okocim Brewery by advertising non-alcoholic beer, was in fact advertising alcoholic beer. Such advertising breaches good practice (Article 3 and Article 16 Section 1 of the Act of April 16, 1993 on suppression of unfair competition) and impairs the interest of another business entity or customer (Article 3 of the Act on suppression of unfair competition), and in consequence constitutes an act of unfair competition.</p>
<b>Comments:</b>	<p>The indirect advertising of alcoholic beer constitutes an act of unfair competition. The main issue is to define the concept of good practice, due to the fact that the breach of good practice constitutes the indispensable premise for classifying the advertising activity of the business entity as an act of unfair competition. The Supreme Court decided that although the concept of “good practice” included in Article 16 Section 1 Item 1 of the Act on suppression of unfair competition has a more narrow scope than the meaning of this concept included in Article 3 of the Act on suppression of unfair competition, the two understandings of this concept may not be opposed to each other.</p>