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Public Enforcement of Consumer Law in Poland: Mission Impossible?[2]

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Abstract

The paper focuses on the issue of public enforcement of consumer law in Poland. This analysis considers exclusively the stage of administrative proceedings and it does not concern judicial control over the decisions issued. The analysis aims at answering the question whether the phenomenon of legal impossibilism is to be observed in the domain administrative proceedings instituted by the President of the UOKiK with the purpose of implementing consumer policy. The hypotheses to be verified in the foregoing are as follows: (i) there are procedural mechanisms which enable an authority to effectuate protection of consumer rights, operating to the public benefit, and that (ii) it might be reasonable to expect that these mechanisms are exploited in practice by the President of the UOKiK. The first part considers the legal framework for enforcing consumer rights with the use of public law mechanisms in Poland. In the second part, the discussion revolves around the practical application of the legal instruments by the President of the UOKiK. The conclusions constitute a starting point to initiate further, in-depth empirical studies related to the activities undertaken by the President of the UOKiK with the aim to effectuate protection of consumer rights in Poland.

Keywords: consumer protection, collective consumer interests, public enforcement, Act on Competition and Consumer Protection, practices infringing collective consumer interests, abusive clauses used in standard agreements.

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Wdrażanie ochrony konsumentów w interesie publicznym w Polsce: *mission impossible*?[3]

Streszczenie

Przedmiotem rozważań zawartych w niniejszym artykule jest problematyka egzekwowania prawa ochrony konsumentów w interesie publicznym w Polsce. Niniejsza analiza ograniczona jest wyłącznie do fazy postępowania administracyjnego i nie obejmuje sądowej kontroli wydawanych rozstrzygnięć. Celem badań jest udzielenie odpowiedzi na pytanie, czy zjawisko imposybilizmu prawnego można zaobserwować w obszarze postępowań administracyjnych prowadzonych przez Prezesa UOKiK w celu realizacji zadań polityki konsumenckiej. W artykule weryfikowana jest hipoteza mówiąca o tym, że (i) w prawie polskim istnieją mechanizmy proceduralne umożliwiające organowi realizację ochrony konsumentów w interesie publicznym oraz że (ii) istnieje uzasadnione przypuszczenie, iż mechanizmy te są skutecznie wykorzystywane w praktyce przez Prezesa UOKiK. W pierwszej części artykułu dokonano analizy ram prawnych stanowiących podstawę dla działalności organu właściwego w sprawach z zakresu ochrony praw konsumentów w Polsce. W drugiej – zawarto uwagi dotyczące wykorzystania konkretnych instrumentów prawnych w działalności Prezesa UOKiK. Przedstawione wnioski stanowią asumpt do podjęcia dalszych, pogłębionych badań empirycznych dotyczących działalności Prezesa UOKiK na rzecz realizacji ochrony praw konsumentów w Polsce.

Słowa kluczowe: ochrona konsumenta, zbiorowe interesy konsumentów, *public enforcement*, ustawa o ochronie konkurencji i konsumentów, praktyki naruszające zbiorowe interesy konsumentów, klauzule niedozwolone we wzorcach umów.

[3] W niniejszym artykule przedstawiono część badań prowadzonych w ramach projektu nr 2018/28/C/HS5/00083 *Zbiorowe dochodzenie roszczeń konsumenckich w postępowaniu grupowym w polskim systemie prawnym w świetle standardów prawa Unii Europejskiej – osiągnięcia i wyzwania* finansowanego przez Narodowe Centrum Nauki.

Introduction

Consumer protection in Poland has been granted a constitutional rank. In line with the principle included in Article 76 of the Constitution of the Republic of Poland, 'public authorities shall protect consumers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices (…).'[4] The scope of the consumer protection is specified by the statutory law, including but not limited to the Polish Civil Code,[5] the Act on Consumer Rights[6] or the Act on Competition and Consumer Protection.[7] Evidently, the national law on consumer protection[8] is influenced by EU law which transcends into Polish law as a result of the implementation of the legal structures included, among others, in the consumer directives.[9] The EU legislation emphasises the need of restoring balance between the market position of consumers and traders in line with the principle that the main role of the law is to protect the weaker party to the transaction. Therefore, the main goal of the consumer law is to provide consumers with material justice, which is achieved by granting consumers substantive rights such as, for instance, the right of withdrawing from the contract and additionally the right of imposing obligations for traders, involving those related to disclosing some information.

However, in order to make consumer rights effective, there must be a procedural mechanism which enables the enforcement of consumer rights. In Poland,

4 The Constitution of the Republic of Poland as of 2 April 1997.

5 Act of 23 April 1964, Civil Code (Journal of Laws of 1964 No. 16, item 93, as amended).

6 Act of 30 May 2014 on Consumer Rights (Journal of Laws of 2014, item 827, as amended).

7 Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws of 2007 No. 50, item 331, as amended).

8 A list of regulations relating to consumer protection in Poland is available online at the UOKiK website: https://www.uokik.gov.pl/consumer_protection.php (access: 30.09.2020).

9 K. Szczepańska, *Pojęcie konsumenta w „dyrektywach konsumenckich" Unii Europejskiej i orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej – wybrane aspekty prawne*, https://repozytorium.amu.edu.pl/bitstream/10593/13771/1/17_SZCZEPA%C5%83SKA.pdf (access: 2.10.2020); A. Kunkiel-Kryńska, *Prawo konsumenckie UE – dyrektywy oparte na metodzie harmonizacji zupełnej – wprowadzenie i wyrok TS z 10.01.2006 r. w sprawie C-402/03 Skov Æg v. Bilka Lavprisvarehus A/S i Bilka Lavprisvarehus A/S v. Jette Mikkelsen i Michael Due Nielsen*, "Europejski Przegląd Sądowy" 2011, 11, pp. 50–53.

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such mechanisms operate on two paths: public and private enforcement.[10] Firstly, public enforcement is conducted by force of administrative proceedings conducted by the Polish President of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów – UOKiK) – an administration authority responsible for implementing the consumer protection policy. As a central, governmental authority,[11] it institutes proceedings concerning practices involving infringement of collective consumer rights and in cases concerning the classification of clauses in standard agreements as abusive. It needs to be noted that in line with the conceptual framework of the Polish consumer law, the President of the UOKiK acts in the public interest.[12] Therefore, in order to commence and conduct the above-mentioned proceedings, the authority must prove the existence of the public interest which shall be construed as reference to collective consumer interests.[13]

Secondly, there is a private path for consumer law enforcement. In individual cases, consumers may seek redress in civil proceedings before courts. Moreover, the consumers may pursue their claims in group proceedings (a Polish style of class action),[14] or to resolve their disputes out-of-court (using ADR methods).[15] As a preliminary remark, it should be noted that in the Polish law, there are many procedural mechanisms enabling the enforcement of consumer rights.

It must be noted that although the existence of procedural mechanisms in question is indispensable in order to enforce the consumer rights, it constitutes only a prerequisite for the effective law enforcement. Legal impossibilism refers to the situation when material justice is not brought due to the lack of the principles of procedural justice. However, the very existence of procedural norms does not automatically exclude the phenomenon of impossibilism. This phenomenon can also be observed in a situation where the procedural mechanisms exist but they are not applied by the competent authorities or by the entitled entities and therefore, the material justice is not brought, which is what the author aims to verify in this paper.

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10 M. Jagielska, *Collective Redress and Consumer Enforcement in Poland: Why Doesn't It Work?*, [in:] R. Simon, H. Mullerowa (eds.), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?*, Praha 2019, p. 32.

11 Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws of 2007 No. 50, item 331, as amended), Article 29(1).

12 Ibidem, Article 1.

13 A. Żurawik, *Interes publiczny w prawie gospodarczym*, Warszawa 2013, pp. 297–306; see also: Supreme Court of the Republic of Poland, judgment as of 5 June 2008, Ref. No. III SK 40/07.

14 Act of 17 December 2009 on Pursuing Claims in Group Proceedings (Journal of Laws of 2010 No. 7, item 44, as amended).

15 Act of 23 September 2016 on Out-of-court Consumer Dispute Resolution (Journal of Laws of 2016, item 1823, as amended).

The article focuses on some practical aspects of consumer law enforcement in Poland. In view of the leading theme of this volume of "The Critique of Law", which is legal impossibilism in the public administration and in the administrative law, this analysis is limited to the enforcement of consumer rights in the public interest (public model of consumer protection). The analysis aims at answering the question whether the phenomenon of legal impossibilism is to be observed in the domain of administrative proceedings instituted by the President of the UOKiK with the purpose of implementing consumer policy. Bearing in mind the above--mentioned theme of the volume, this analysis considers exclusively the stage of administrative proceedings and it does not concern the judicial control over the decisions issued. The discussion is divided into two parts. The first part considers the legislative framework for enforcing consumer rights with the use of public law mechanisms in Poland. The second part of the discussion revolves around the practical application of the legal regulations by the President of the UOKiK.

Legal Framework for Public Enforcement of Consumer Law

The legal framework for the implementation of consumer policy by the public authorities in Poland is stipulated by the Act on Competition and Consumer Protection[16] (hereinafter referred to as 'the ACCP'). The act governs, among others, the conditions and procedures for counteracting the practices infringing consumer rights. The main axis of the consumer protection is stipulated by two prohibitions imposed on traders: (i) a prohibition against practices infringing collective consumer interests (Articles 24–28 of the ACCP) and (ii) a prohibition against the use of abusive clauses in standard agreements, entered into with consumers (Article 23a of the ACCP). Both prohibitions are introduced into the Polish law as a result of the implementation of consumer directives: Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests[17] (currently repealed by Directive 2009/22/EC)[18] and by Directive 93/13/EEC on Unfair Terms in Consumer Contracts.[19]

16 Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws of 2007 No. 50, item 331, as amended (hereinafter referred to as 'the ACCP').

17 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, OJEC of 11 June 1998, L 166/51, no longer in force.

18 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interests, OJEU of 1 May 2009, L 110/30.

19 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJEC of 21 April 1993, L 95/29.

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The President of the UOKiK is a central government administration authority,[20] competent in the implementation of consumer protection policy. They are responsible for enforcing consumer rights in the public interest against the practices of traders, violating the above-mentioned prohibitions. The President of the UOKiK eliminates the anti-consumer practices by way of their competence to initiate the proceedings in which they may issue (i) decisions on the practices infringing collective consumer interests and (ii) decisions classifying clauses in standard agreements as abusive. The President of the UOKiK is also entitled to impose fines and public compensation on traders infringing consumer rights. The decisions of the President of the UOKiK may be appealed against to the Court for the Protection of Competition and Consumer (Sąd Ochrony Konkurencjii i Konsumentów, SOKIK) in Warsaw (Article 81 of the ACCP).

Apart from the competence to initiate the above-mentioned proceedings, the President of the UOKiK may also contact traders in matters relating to consumers and request them to stop a specific unfair practice or stop applying wrongful provisions (a so-called 'soft call', specified in the Article 49a of the ACCP). Such soft calls are a kind of informal interaction between the authority and the trader. Their goal is to explain the relevant doubts and to eliminate the unfair activities against weaker trade partners from the market as soon as possible. The trader, to whom the President of the UOKiK applied, may voluntarily express the stand as regards the matter to which the application relates. Lack of co-operation with the administrative body does not raise any negative consequences for the trader. However, in spite of the lack of its formal character, in practice, the soft calls issued by the President of the UOKiK play a significant role in the process of the enforcement of consumer rights.

Prohibition against the practices of infringing collective consumer interests

Defining the practice of infringing collective consumer interests, the national legislator adopted a broad approach, according to which such a practice shall mean any activity undertaken by a trader which is unlawful, contrary to the established custom and detrimental to such an interest (Article 24 of the ACCP). Examples of such practices are mentioned in the ACCP and include (but are not limited to) the breach of the duty to provide consumers with reliable, truthful and complete information, unfair market practices or acts of unfair competition, or offering the

[20] Act of 16 February 2007 on Competition and Consumer Protection (Journal of Laws of 2007 No. 50, item 331, as amended), Article 29(1).

consumers the purchase of financial services which do not correspond to the needs of these consumers (the so-called 'misselling'). Currently, the above-mentioned list of exemplary practices infringing collective consumer interests does not include the application of abusive clauses in standard agreements. In view of the remodelling of the system of abstract (general) control over the standard agreements, which is discussed in point b) below, the prohibition on the use of abusive clauses in standard agreements was separated in Section IIIa of the ACCP.

Proceedings on the practices infringing collective consumer interests are instituted *ex officio* by the President of the UOKiK. Currently, it is the only entity authorised to initiate such proceedings.[21] Additionally, the ACCP provides the possibility of giving the President of the UOKiK a notice of a suspected commitment of practices infringing collective consumer interests. Such a notice may be given by anyone and it must be submitted in writing. A person giving the notice is not deemed to be a party to the proceedings and the President of the UOKiK has no legal obligation to initiate the proceedings following the notice. The President is exclusively obliged to inform the entity submitting the notification, within the specified time limit, about the manner in which the notice has been processed, stating the reasons for it (Article 86(4) of the ACCP). The goal of the proceedings initiated before the administrative authority is to issue a decision mentioned in Articles 26–28 of the ACCP. In line with these provisions, the President of the UOKiK may issue: (i) a decision finding that a practice infringes collective consumer interests and ordering it be discontinued (Article 26 of the ACCP), (ii) a decision finding that the practice infringed collective consumer interests and stating that it has been discontinued (Article 27 of the ACCP), (iii) a decision in which the trader commits itself to taking or discontinuing certain actions in order to prevent the infringement of collective consumer interests (Article 28 of the ACCP). Each of those decisions may include some additional elements which shall ensure the effectiveness of the ruling.[22] By way of example, the President of the UOKiK may order the trader to publish the decision at his expense or to order the trader to remove the effects of the infringement by making a specific statement regarding the content, in the form specified in the decision. Issuing a decision ends the proceedings before the administrative body.

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21 For doubts regarding the compliance of such a solution with Directive 2009/22/WE, see: J. Mucha, *Nowy model ochrony zbiorowych interesów konsumentów w UE i możliwości jego wdrożenia do prawa polskiego*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2019, 8, pp. 7–24.

22 M. Sieradzka, *Rekompensata publiczna a inne środki usunięcia trwających skutków naruszenia zbiorowych interesów konsumentów*, "Internetowy Kwartalnik Antymonopolowy i Regulacyjny" 2018, 6(7), p. 80.

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Prohibition on the application of abusive clauses in standard agreements

Up to 2015, the classification of the clauses in standard agreements as abusive (so-called 'abstract control of standard agreements') was conducted by the Court of Competition and Consumer Protection (SOKiK) within the judicial model of control. Such clauses which were pronounced abusive in the final court decision were prohibited and were subsequently entered in the register of abusive contract terms, run by the President of the UOKiK. Prohibition of the use of abusive clauses in standard agreements up to 2015 was classified as one of the practices infringing the collective consumer interests.

In 2015, the ACCP was amended, which resulted in the change of a model of the abstract control of the provisions in standard agreements. In line with this amendment, the judicial model of control of standard agreements is replaced by the administrative model.[23] As a result, the President of the UOKiK has been granted broad competence to control the standard forms of contracts entered into with consumers. The amendment of the ACCP repealed the provision stating that the use of abusive clauses in standard agreements which have been entered in the register of provisions pronounced inadmissible constitutes a practice infringing the collective consumer interests (Article 24(2)(1) the ACCP, not in force). Provisions referring to the prohibition on the application of abusive clauses of standard agreements are currently included in the separated part in Section IIIa of the ACCP. At the same time, the national legislator decided to stop using the register of provisions pronounced inadmissible[24] since this was recognised as excessive and illegible.[25]

The prohibition on the use of abusive clauses in standard agreements is set in Article 23a of the ACCP. The national legislator does not define there the notion of 'abusive clauses' but they refer to the definition included in Article 385^1 of the Polish Civil Code. In line with the relevant definition, provisions of a contract executed with a consumer, which have not been agreed upon individually, are not binding for the consumer if that consumer's rights and obligations are set forth in a way that is contrary to good practice and grossly violates that person's interests. This does not apply to the provisions specifying the main performances of the

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23 Act of 5 August 2015 Amending the Act on Competition and Consumer Protection and Other Acts (Journal of Laws of 2015, item 1634).

24 The existing register of abusive clauses, run by the UOKiK is a legacy of the past legal order. The clauses entered into the register are exclusively clauses referring to the cases in which action at law was brought to UOKiK before 17 April 2016.

25 Statement of Reasons for Amendment to the Act on Competition and Consumer Protection, Sejm paper No. 3662, http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=3662 (access: 2.10.2020).

parties, including the price or remuneration, as long as they are worded clearly. One shall note, however, that Article 23a of the ACCP refers to the standard agreements, which means that it refers to the provisions prepared for the purpose of multiple use of them. Thus, in the abstract (general) model of control, in which the control is restricted to the standard agreements and it is conducted regardless of the fact whether specific contract based on the standard agreement has been executed with a customer, the requirement of individual agreement on the contractual provisions loses its significance.[26]

Proceedings in cases concerning classification of clauses in standard agreement as abusive are instituted *ex officio* by the President of the UOKiK (Article 49 of the ACCP). Additionally, there are several entities entitled to submit in writing the notice of suspected infringement of the above-mentioned prohibition to the President of the UOKiK. This list includes any consumer, consumer ombudsman, the Polish Insurance Ombudsman, a consumer organisation or a foreign organisation, registered on the list of organisations which have the power, in EU Member States, to file a request for proceedings to be instituted concerning the classification of clauses in standard agreements as abusive, published in the Official Journal of the European Union, where the object of its activity warrants its submitting a notification concerning standard contract terms used in Poland which jeopardises the collective consumer interest in the Member State where the organisation has its seat. In the notification entitled entities mentioned above shall include the trader alleged to have used abusive clauses in a standard agreement, the facts being the basis for notification, the clause in the standard agreement that is an infringement of the prohibition, facts rendering plausible infringement of the prohibition and details identifying the entity filing the notification (Article 99a(2) of the ACCP). The entities entitled to submit the notification are not deemed as the party to the proceedings but they may request the President of the UOKiK to be admitted to the proceedings as an interested party. The President of the UOKiK admits such an entitled entity if they believe that the entity's participation may help with the investigation of the case (Article 99c of the ACCP). A party is defined as any person with respect to whom the proceedings concerning the classification of clauses in standard agreements as abusive have been instituted (Article 99b of the ACCP), which allows one to conclude that the only parties to the proceedings are the trader and the authority.

If the President of the UOKiK finds the prohibition specified in Article 23a of the ACCP to have been infringed, they issue a decision classifying a clause in a standard agreement as abusive and prohibit the use of that clause. In the decision,

[26] K. Pacuła, *Komentarz do artykułu 23a*, [in:] K. Osajda (ed.), *Ustawa i ochronie konkurencji i konsumentów. Komentarz 2020*, 3rd edition, 2020, Legalis.

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the President of the UOKiK cites the wording of the clause in a standard agreement which is classified as abusive (Article 23b of the ACCP). Additionally, in their decision, the President of the UOKiK may specify measures for remedying the ongoing effects of infringement of the prohibition (for instance, to require the trader to inform consumers who are the party to agreements which are based on a standard agreement that clauses in that standard agreement have been classified as abusive or to require the trader to make a single or recurring statement of the wording in the form specified in the decision, in line with Article 23b of the ACCP). The commitment decision mentioned above constitutes a part of the decision classifying a clause in a standard agreement as abusive, in which the trader commits itself to take or cease actions in order to stop the infringement or to remedy any consequences thereof.[27] The main advantage of such a commitment for the trader is that in such a case, the President of the UOKiK cannot impose a fine set forth in the Article 106(1)(3a) of the ACCP,[28] as discussed below.

Measures adopted in order to eliminate anti-consumer practices

The main measure aiming at permanent elimination of anti-consumer behaviour consists in a possibility of imposing a fine upon a trader. In the light of the present legislation, if a trader has, even unintentionally, infringed prohibitions mentioned in Article 23a (prohibition against the use of abusive clauses in standard agreements) or Article 24 of the ACCP (prohibition against practices infringing collective consumer interests), the President of the UOKiK may impose upon a trader by way of a decision a maximum fine of 10% of the turnover generated in the financial year preceding the year in which the fine is imposed (Article 106(1)(3a–4) of the ACCP). Additionally, the President of the UOKiK may impose upon the managing person, if such person has intentionally allowed the trader to infringe the prohibitions mentioned above, a fine in the amount of PLN 2 million (Article 106b(1) of the ACCP).

Apart from the competence to impose fines in the decisions confirming infringement of consumers' collective interests, the President of the UOKiK may use another measure, i.e. so-called public compensation.[29] In line with the definition coined in the literature of the subject, this measure aims at remedying the effects of the infringement of collective consumer interests. According to Kohutek, '(…) it consists in

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27 M. Namysłowska, *Decyzje Prezesa UOKiK w sprawach o uznanie postanowień wzorca umowy za niedozwolone*, "Przegląd Ustawodawstwa Gospodarczego" 2016, 5, pp. 3–8.

28 Eadem, *Decyzja zobowiązująca w sprawach o uznanie postanowienia wzorca umowy za niedozwolone w sektorze bankowym*, "Monitor Prawniczy" 2016, 18, Legalis.

29 https://www.uokik.gov.pl/aktualnosci.php?news_id=12156 (access: 10.10.2020).

imposing on a trader concerned (the infringer) an order to pay to the consumer a certain amount of money or to make another financial benefit.'[30] Public compensation can have the form of the obligation or the trader's voluntary commitment to take action to remove the effects of the violation of consumer collective interests. It needs to be noted, however, that in the literature of the subject, public compensation is considered a measure whose admissibility of application raises doubts particularly in the context of compliance with constitutional principles and provisions of the ACCP.[31]

How Consumer Rights Are Enforced by the President of the UOKiK?

As can be seen from the analysis of the data provided in the reports of the activities conducted by the UOKiK in subsequent years, the President of the UOKiK actively uses their competences to eliminate anti-consumer practices. This testifies to the fact that the President of the UOKiK constantly monitors the behaviours of traders mainly thanks to the signal from the market participants themselves. It was demonstrated in this discussion that anyone may submit a written notice of a suspected use of prohibited practice infringing the collective consumer interests. Moreover, there is a group of several entities entitled to submit a notice of suspected infringement of the prohibition on the use of abusive clauses in standard agreements. However, it remains at the discretion of the President of the UOKiK whether and how they will react on the notification submitted by the market participants. Consequently, if the President of the UOKiK decides to react on the notification, they may commence the proceedings against a trader or adopt some informal measures such as, for instance, executing a soft call. Importantly, the only parties to the proceedings are the authority and the trader. Consequently, there is no control over the President of the UOKiK in the case of their inactivity or failure to pursue the action. Such a regulation has been justifiably criticised in the literature of the subject.[32]

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30 K. Kohutek, *Rekompensata publiczna jako środek usunięcia skutków naruszenia zbiorowych interesów konsumentów: wątpliwości systemowo-kompetencyjne*, "Studia Prawnicze. Rozprawy i Materiały" 2019, 1(24), p. 36.

31 Ibidem.

32 K. Pluskwa-Dąbrowski, *Collective Redress in Consumer Cases: How to Launch in Practice in Poland*, [in:] R. Simon, H. Mullerowa (eds.), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?*, Praha 2019, pp. 129–136.

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The data included in the report of the UOKiK point to the fact that in 2018, the UOKiK received 5,291 signals, complaints and notifications from consumers, the consumer ombudsman and institutions.[33] The UOKiK notes that more than 80% of those signals (that is around 4,230) constituted a valuable source of information in relation to the market situation and the infringements committed by traders. In 2018, the UOKiK initiated *ex officio* 125 explanatory proceedings whose goal was initially to identify violations and 91 proceedings against specific traders (65 proceedings on the practices infringing collective consumer interests and 26 proceedings on prohibited contractual clauses). In 2018, the UOKiK issued 22 commitment decisions serving the purpose of actual elimination from the market of prohibited practices targeted at consumers and elimination of their continuing effects. Moreover, the UOKiK applied 400 soft calls to traders. According to the data provided by the UOKIK, traders frequently comply with soft calls and consequently, there is no need to initiate proper proceedings in such cases.[34]

In spite of the above-mentioned positive tendency, traders still infringe consumer rights, which is particularly visible in the light of the analysis of the decisions issued by the President of the UOKiK.[35] These decisions are published on the UOKiK website since the scope of the activities of the President of the UOKiK includes, among others, collecting and disseminating decisions and judgments concerning competition and consumer protection (Article 31(15) of the ACCP). As can be seen from the data published on this website, in 2017–2020,[36] the President of the UOKiK issued 44 decisions in total on finding contractual clauses to be abusive and 225 decisions on practices infringing consumer collective interests. Many of them included very high penalties imposed on traders. By the way of example, in some of the latest decisions issued in 2020 and finding contractual clauses to be abusive, the President of the UOKiK imposed fines of over PLN 60 million for banks (PLN 26.6 million on BNP Paribas, decision No. DOZIK-14/2020;[37] PLN 10.5 million on Millenium, decision No. DOZIK-13/2020;[38] and PLN 23.6 million on Santander,

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33 *Report on UOKiK's Activity in 2018*, Warsaw 2019, https://www.uokik.gov.pl/publikacje.php?tag=1 (access: 10.10.2020).

34 Ibidem, p. 46.

35 Decisions of the President of the UOKiK are published online: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf (access: 10.10.2020).

36 As of 30 September 2020.

37 Decision of the President of the UOKiK as of 22 September 2020, No. DOZIK-12/2020, v. Santander Bank Polska SA with registered office in Warsaw (the decision is not final).

38 Decision of the President of the UOKiK as of 22 September 2020, No. DOZIK-13/2020, v. Bank Millenium SA with registered office in Warsaw (the decision is not final).

decision No. DOZIK-12/2020[39]). The President of the UOKiK questioned the provisions contained in credit agreements, imprecisely defining the principles of determining foreign exchange rates, based on which banks convert credit instalments due. As a result of the existing provisions, banks may subjectively determine exchange rates which are the basis for determining the number of instalments paid by borrowers. The President of the UOKiK found that such clauses are abusive, prohibited the use of them and imposed the fines on the banks.[40]

Furthermore, in recent years, one of the highest financial penalty (in the amount of PLN 115 million), imposed as a result of the practice infringing collective consumer interests, was imposed on the company Jeronimo Martins Polska (the owner of the Biedronka chain stores).[41] In the decision No. RBG-6/2020, the President of the UOKiK found an incorrect display of prices in the Biedronka chain stores. Complaints made by consumers, which formed the basis for the instigation of proceedings against the owner, referred to the prices which were higher at the checkout than on the shop shelves or to the absence of prices on goods themselves. This caused a serious violation of consumer rights to be provided with fair, truthful and complete information. The decision is appealable.

It needs to be noted that in recent years, the decisions issued by the President of the UOKiK significantly often require the trader to pay public compensation for consumers in order to compensate for infringing their collective interests. This measure is frequently used by the President of the UOKiK due to the fact that the fines imposed on the traders do not remedy the consumers' financial loss that they suffered as a consequence of the unfair practice. What is more, due to the fact that the decisions of the President of the UOKiK are appealable to the court, the amount of the fines is frequently reduced by the courts, following the appeal. The tendency referred to above mitigates the deterrent role of penalties and therefore, it motivated the President of the UOKiK to seek other instruments of a suppressive character, such as public compensation.[42] On the basis of the examples of such instruments used in the past years by the authority, in order to eliminate the ongoing effects of unfair practices, the President of the UOKiK in their decisions required: (i) T-Mobile to pay compensation to its customers who were informed about unilateral change

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39 Decision of the President of the UOKiK as of 22 September 2020, No. DOZIK-14/2020, v. BNP Paribas Bank Polska SA with registered office in Warsaw (the decision is not final).

40 https://www.uokik.gov.pl/news.php?news_id=16783 (access: 10.10.2020).

41 Decision of the President of the UOKiK as of 5 August 2020, No. RBG-6/2020, v. Jerimo Martins Polska SA with registered office in Kostrzyn (the decision is not final).

42 UOKiK, *Public Compensation in UOKiK's Decisions*, https://www.uokik.gov.pl/aktualnosci.php?news_id=12159 (access: 21.10.2020).

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in terms of the contract (increase of monthly charges);[43] (ii) Canal+ to offer free services or to pay a cash benefit to consumers due to the unilateral increase of the subscription fee[44] or (iii) Getin Noble Bank to decrease the interest rate or return the interests charged for the last 6 months of loan repayment due to the fact that the bank did not comply with the provisions setting forth the requirements for consumer loans advertising.[45] One of the highest amount of the public compensation was ordered by the President of the UOKiK in the decision against Idea Bank (decision No. RŁO-5/2020).[46] This decision relates to the investment certificates offered by the bank to the consumers who prefer safe investments. Those consumers had never dealt with investment products and were not interested in risky investments. The President of the UOKiK found that the bank provided consumers with untrue information about the risks and profits and classified such practice as so-called misselling since the investment certificates were offered to consumers in a way that was not adapted to their needs. The President of the UOKiK ordered to pay compensation in the amount of PLN 38,000 to each consumer who purchased investment certificates. In total, Idea Bank must pay out several millions PLN to consumers.[47] The decision was appealed against to the SOKiK and the case is pending.

Conclusions

At first glance, the general conclusion to be drawn from the analysis might be that the phenomenon of legal impossibilism does not exist in the field of administrative proceedings run by the President of the UOKiK, conducted in order to enforce consumer rights in the public interest. As indicated above, the national legislation provides some procedural mechanisms which enable the authority to act in order to protect consumer rights. These mechanisms are used by the President of the UOKiK in the proceedings concerning practices infringing collective consumer interests and in cases concerning the classification of clauses in standard agreements as abusive.

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43 Decision of the President of the UOKiK as of 30 December 2015, No. DDK-28/2015 (decision dismissed by the judgement of the SOKiK as of 21 May 2018, Ref. No. XVII AmA 39/16).

44 Decision of the President of the UOKiK as of 27 March 2015, No. DDK-2/2015 (final decision).

45 Decision of the President of the UOKiK as of 30 June 2017, No. RKR-4/2017. The decision was dismissed in part by the judgement issued by the SOKiK as of 19 February 2019, Ref. No. XVII AmA 46/17, but the obligation of the bank as for the interest rate decrease or return of the interest rated collected remained in force.

46 Decision of the President of the UOKiK as of 10 July 2020, No. RŁO-5/2020, v. Idea Bank SA with registered office in Warsaw (the decision is not final).

47 https://www.uokik.gov.pl/news.php?news_id=16620 (access: 10.10.2020).

The exploitation of these tools is evidenced, among others, by the number of decisions issued every year by the President of the UOKiK.

However, it needs to be stated that the decisions issued by the President of UOKiK do not necessarily improve the status quo as regards the actual protection of consumer rights. The activities undertaken by the President of the UOKiK in the said area are to operate as a preventive measure which makes it possible to inflict the relevant penalties. One needs to bear in mind that the financial penalties imposed on the entrepreneurs do not compensate for the losses incurred by the consumers due to unfair practices. What is more, the tendency is on the increase to lower the amount of penalty by the courts during the appeal proceedings against the decision issued by the President of the UOKiK. This tendency significantly decreases the repressive function of penalties, and at the same, time it makes the President of the UOKiK employ other available legal measures, including public compensation. Bearing in mind the fact that this measure has been exploited for a short time only,[48] many appeal proceedings against the decisions issued are still pending. Thus, it is not possible to unequivocally conclude whether – and if so, how many – decisions issued by the President of the UOKiK affected the situation of consumers.

It is also worth noting that although in the opinion of the President of the UOKiK, some informal, soft instruments are particularly effective, due to the lack of specific data regarding such interventions, in practice, it is not possible to conclude exactly how frequently traders adjust their practices to the requirements resulting from legal regulations or best practices.

At this stage of research, it needs to be noted that the number of decisions issued and the normative scope of the competences of the President of the UOKiK in question set the ground for concluding that its scope of operation is wide, but the legality, rationale and purposefulness of those decisions have not been verified so far in the court proceedings. In order to have a complete picture of the public enforcement of consumer law in Poland, it is indispensable to scrutinise the decisions issued by the President of the UOKiK in greater detail and analyse proceedings pending before the SOKiK, which – at this stage – exceeds the scope of this paper but constitutes a fruitful research area for further analysis to come.

[48] K. Kohutek, op. cit., p. 36.

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