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Consumer protection under Polish private law

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This article discusses the provisions of Polish private law that grants protection to consumers. Particular attention is paid to contract law, but the impact of public law regulations for the provisions of civil law is also taken into consideration. The author presents a number of legal instruments used by Polish law in order to protect consumers in their dealings with merchants and analyzes the main features of consumer protection law in Poland. The influence of European legislation on Polish regulations is also discussed. It goes without saying that Polish consumer protection legislation has to be in line with EU directives. As is known, the protection of consumers plays an important role in EU legislation. The Polish lawmaker has the duty to implement European directives properly and timely into national law. Many Polish regulations regarding consumer protection seem to be a certain kind of translation of European directives. This is the simplest but probably the riskiest method of transposing EU law because it may lead to inconsistencies with national regulations. Although sometimes it seems to be forced by a tight timeline. At the same time, the general competence of the European Union for enacting consumer protection law as a part of civil law is lacking. This is due to the fact that the six founding Member States of the European Economic Union deemed law of contracts as part of the European Treaties to be redundant, since the legal systems of the states — founders of the Union, all based on Roman Law, should already provide a mutual understanding. It is obvious that the consumer needs protection in his/her dealings with merchants as he/she is a weaker party to the transaction. This weakness stems mainly from a lack of information and poor bargaining power. The consumer will never be a real partner in negotiations with a bank, a utility company or an airline.

Keywords: consumer, merchant, unfair contract terms, mandatory provisions, informational duties, distance sales, private law.

Introduction

The goal of this article is to present key regulations of Polish private (civil) law aiming at granting protection to consumers in their dealing with businesses. Of course, it is not possible to analyse them in detail in such a short text. My intention is rather to show a panorama of legal instruments used by the Polish law maker to restore the balance between the consumer and the professional counterparty to the transaction. As mentioned, this paper is limited to private law, in particular law of contracts, and thus discusses the roles and powers of public authorities enforcing consumer protection rules to a limited extent. However, the impact of public law regulations for the system of consumer protection in Poland cannot be underestimated and thus it is also mentioned in this text.

1. European background of Polish consumer law

It goes without saying that Polish consumer law has to be in line with EU directives. As is known, the protection of consumers plays an important role in the EU legislation. The Polish law maker has the duty to implement European directives properly and timely into

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national law. Many of Polish regulations regarding consumer protection seem to be kind of translation of European directives. This is the simplest but probably the riskiest method of transposing EU law because it may cause inconsistencies with national regulations. Sometimes it seems to be forced by a tight timeline though. For example, it was used when implementing Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[1] into Polish law. Its provisions were transposed in the Act of 27 July 2002 on special conditions of consumer sales[2]. This act turned out to be inconsistent with the provisions of the Civil Code on the sale contract and the implied warranty for defects of the sold thing, and thus raised many doubts, being criticized by legal scholars[3]. As a result thereof, it was finally repealed and the law maker decided to adjust the Civil Code's provisions on implied warranty to the requirements stemming from Directive 1999/44/EC (amended by directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights). Such a compilation of new and old provisions, respecting Polish legal tradition, turned out to be much more successful, and it is not a carbon copy of the directive[4].

The European roots of Polish legislation and our membership in the EU also mean that the jurisprudence of the Court of Justice of the European Union (hereinafter CJEU) plays an important part in the process of construing and applying consumer law. There are also CJEU rulings that originate from the proceedings before Polish courts. One of the famous ones is the judgment of 3 October 2019 delivered in case C-260/18 (Kamil Dziubak, Justyna Dziubak vs Raiffeisen Bank International AG) re. the consequences of abusive clauses in mortgage loan agreements. Of course it is of importance not only to Polish banks and Polish citizens. Thus, Poland does not only take from the European law but also contributes to its development.

2. Dispersion of consumer law

Another feature of consumer law in Poland is its dispersion. There is a multitude of legal acts in which relevant regulations aiming at protecting the consumer may be found. The most important ones are provided for in the Civil Code. The Code was enacted on 23 April 1964, at the time when there was no such thing as consumer protection law in Poland (officially, it was not needed in a socialist state!). After the transition from communism to capitalism, the Code was amended on several occasions in order to respond to challenges of the free market and to make Polish law compliant with the EU legislation. The Civil Code provides for a definition of a consumer and implements Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,

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[1] Hereinafter all European Communities acts are available at: https://eur-lex.europa.eu/oj/direct-access.html (accessed: 29.01.2022).

[2] Hereinafter all Polish acts are available at: https://dziennikustaw.gov.pl/DU (accessed: 29.01.2022).

[3] *Habryn-Chojnacka E.* Sprzedaż // Kodeks cywilny. Komentarz: in 2 vols. Vol. II / ed. M. Gutowski. Warszawa: C. H. Beck, 2016. P. 392; *Pecyna M.* Ustawa o sprzedaży konsumenckiej — komentarz. Kraków: Zakamycze, 2004. P. 13–14.

[4] By the way a new bill is being discussed currently in Poland which aims at implementing the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ.L 136/28. 22.05.2019). It provides for moving the provisions on contractual warranty and implied warranty in consumer sale contract from the Civil Code to a separate legal act again. Available at: https://legislacja.rcl.gov.pl/docs//2/12341810/12752744/12752745/dokument482587.pdf (accessed: 29.01.2022).

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. The Code's provisions are of a general nature and apply to all sorts of businesses. At the same time, such general regulation is also contained in separate acts. Suffice it to mention the Act of 30 May 2014 on consumer rights, implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC as well as Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. Despite its ambitious title, it does not regulate all consumer rights but only the requirements regarding the execution of contracts with consumers. Pursuant to its Article 1, it focuses on:

— trader's liabilities concluding a contract with a consumer;
— rules and manner of concluding a contract at a distance and outside the undertaking's seat (off-premises contract);
— rules and manner of exercising the consumer's right to withdraw from the contract concluded at a distance or outside the undertaking's seat;
— rules and manner of concluding a contract at a distance in regard to provision of financial services.

Also the Act of 23 August 2007 on unfair commercial practices has a general application. It is a transposition of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council. Such "horizontal" regulation is also to be found for example in Act of 16 February 2007 on protection of competition and consumers and the Act of 16 April 1993 on unfair competition. Also the Act of 7 October 1999 on the Polish language lays down some consumer-oriented provisions that apply to all sort of business activities.

Parallelly, there are "sectoral" legal acts providing for consumer protection only in certain markets. They are to be found *inter alia* in the Act of 5 August 2015 on complaints handling by financial institutions and the Financial Ombudsman, the Act of 12 May 2011 on consumer credit (implementing Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC), the Act of 16 September 2011 on timeshare (implementing Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts), the Telecommunication Law Act of 16 July 2004, the Energy Law Act of 10 April 1997 and many others. They adjust the general mechanism to the specific requirements of a given sector. Some of the adopted provisions comprehensively regulate a given contract, "consumer-wise" by nature, but most of them only introduce a "consumer factor" into individual types of contract regulated in the corresponding sectoral acts. As a rule, their aim is to incorporate European law into the national legal system. As studies observe, "EU consumer law does not constitute a coherent legal system, and its regulations regarding consumer contracts are not only discrete and particular in nature but they are also fragmentary. <…> The legislative approach of the EU law maker to regulation of consumer contracts does not find much common ground with the manner in which the Polish legislator regulates a particular type or sub-type of a

non-consumer contract"[5]. Therefore, consumer provisions regarding a majority of contracts regulated in Polish law are also fragmentary in nature, bulleted and refer only to selected aspects.

As mentioned above, the consumer protection rules are also dispersed throughout European law. As observed in the literature, "A general competence of the European Union for enacting consumer law as a part of a civil law is lacking. This is due to the fact that the six founding Member States of the European Economic Union deemed law of contracts as part of the European Treaties to be redundant, since the legal systems of Belgium, France, Germany, Italy, Luxembourg and the Netherlands, all based on Roman Law, would already provide a mutual understanding"[6].

3. Notion of consumer

Unlike in EU directives, there is a universal definition of a "consumer" under Polish law. According to Art. 22^1 of the Civil Code (hereinafter CC), "a consumer is any natural person performing with an entrepreneur a legal act which is not directly related to his business or professional activity". The notion of a "consumer" is limited to natural persons, i. e. human beings. It means that for example a charity being a foundation or association will not benefit from the consumer protection. It has not always been the case though. The previous definition of a consumer used in the Civil Code, introduced by Act of 2 March 2000 on protection of *certain consumer rights* and the liability for damage caused by a dangerous product stated that "a consumer is any person concluding with an entrepreneur a contract which is not directly related to his business activity" (former Art. 384 § 3 of the CC). Thus, it related to all kind of legal entities. Narrowing down the concept of a consumer to a natural person only was explained by the tendency prevailing in the European consumer law. However, the procedure met with mixed reviews; the legal doctrine both supported and criticized it[7].

It is important to note that if an individual conducts business or professional activity, he or she enjoys protection depending on whether the transaction relates directly to this activity or not. The same person may possess the status of a consumer in one contract, whereas in another one it is treated as a professional. As it is aptly stated in a ruling of the Appelate Court in Poznań of 30 December 2019, case No. I ACa 1025/18 (LEX No. 3021133), "a relation between an activity and a trade or professional business must be direct, which means that the existence of a merely indirect relation does not exclude assumption that the person performing an activity is a consumer. If a given natural person does not conduct a business or professional activity (is an employee, a retiree, a person drawing a disability benefit), he/she will always be regarded as a consumer in a contract concluded with a trader".

It is obvious that the consumer needs protection in his/her dealings with entrepreneurs, as he/she is a weaker part to a transaction. This weakness stems mainly from the lack of information and poor bargaining power. The consumer will never be a real partner in negotiations with a bank, a utility company or an airline. Having in mind the above, there is a dilemma to what extent a consumer shall be protected. Does the consumer law release him/her from all diligence? The answer to this question relates to the very notion of a

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[5] *Gnela B.* Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym. Warszawa: Wolters Kluwer Polska, 2013. P. 65.

[6] *Kilian W.* Consumer protection in the information and telecommunications technology sector. Current state and potential developments // Potencjalne i rzeczywiste standardy ochrony prawnej konsumenta / ed. R. Stefanicki. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2011. P. 10.

[7] See: *Pazdan M.* Osoby fizyczne // System Prawa Prywatnego: in 20 vols. Vol. 1 / ed. M. Safjan. Warszawa: C. H. Beck, 2012. P. 1111.

consumer. What sort of consumer deserves protection? A diligent one or, on the contrary, a reckless one? The answer is provided in the Act of 23 August 2007 on unfair commercial practices. Its Article 2 point 8 contains a definition of an "average consumer", which reads that it shall mean a person who is reasonably well-informed and reasonably observant and circumspect; this assessment takes into account social, cultural and linguistic factors and whether the consumer in question belongs to a particular group of consumers, i. e. a clearly identifiable group of consumers which is especially vulnerable to a commercial practice or the product which it concerns because of particular characteristics such as age or physical or mental disability. Such an approach has been confirmed in several court rulings. For example, it was held in a ruling of the Supreme Court of 29 November 2013, case No. I CSK 87/13 (LEX No. 1418874) that "it is currently assumed that a consumer is not an unaware person who should be always protected in relation to their contact with a professional, i. e. a trader, but that a consumer is well-informed, observant and rational". It does not mean that the consumer is deprived of protection though. The Appellate Court in Warsaw ruled in its judgement of 10 February 2015, case No. VI ACa 567/14 (LEX No. 1746369) that "a consumer, even a well-informed and very observant one is not a professional. His/her knowledge does not comprise specialized knowledge and he/she cannot assess a situation like a professional. However, even a circumspect and observant customer is entitled to reliable and non-misleading information compliant with the law".

It was assumed in a ruling of the Supreme Court of 18 July 2019, case file No. I CSK 587/17 (LEX No. 2727474), that "a natural person solely managing his/her assets by investment of his/her funds (savings) into financial instruments (including purchase and sale of stocks and shares), the aim of which is unrelated directly to his/her business or professional activity is a consumer. The status of a consumer is granted irrespective of the aim of the undertaken activity (gaining profit, increasing financial assets, tax benefits, consumption at retirement, leaving assets to heirs), and regardless of the value and scale of the invested means, the person's substantive competences, experience and scale of the investment risk. A stock exchange investor can be regarded as a consumer in the event that he/she carries out two-way operations (purchase and sale of stocks) since the definition of the consumer of Art. 22^1 of the CC does not determine which part of a legal transaction a consumer should constitute. Also, the definition does not refer to the value or number of the conducted operations, although the criteria might be relevant to the assessment whether the given person carries out a business activity".

As mentioned, the definition of a "consumer" stemming from Art. 22^1 of the CC is a horizontal one. There are, however, laws that do not use it. The Energy Law Act of 10 April 1997 is a good example in this respect. It uses the notion of a household end user (of gaseous fuels, electricity or heat), which is defined as a final recipient buying gaseous fuel, electricity or heat with a sole view to using them in a household (Art. 3 point 13b). At the same time, the notion of a household end user used in the provisions on dealings with energy undertakings is in fact the equivalent of a notion of a consumer.

4. Casuistic approach

One of the characteristic features of consumer law is a casuistic approach. The provisions of the CC granting consumer protection are detailed and even "long-winded". As a rule, the CC uses many general clauses that are open for construal and refer to ethic values, thus giving necessary flexibility to the judge. For example, Art. 5 referring to so-called abuse of right states that "one cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not pro-

tected". Under Art. 56, "a legal act gives rise not only to the effects expressed therein but also to those which stem from the law, principles of community life and established custom". Art. 58 § 2 states that "a legal act contrary to the principles of community life is invalid". Pursuant to Art. 65 § 1, "a declaration of intent should be construed in view of the circumstances in which it is made as required by principles of community life and established customs". Art. 353^1 of the CC reads that "parties executing a contract may arrange their legal relationship at their discretion as long as the content or purpose of the contract is not contrary to the nature of the relationship, the law or the principles of community life". Art. 354 states in § 1 that "a debtor should perform his obligation in accordance with its substance and in a manner complying with its social and economic purpose and the principles of community life, and if there are established customs in this respect — also in a manner complying with these customs". Theoretically, these provisions could be sufficient to guarantee a sufficient level of consumer protection. The general clause of principles of community life encompasses the protection of a weaker party to the transaction. Nevertheless, this is only a theoretical assumption and the law maker decided not to take this approach in reference to consumer protection. It was observed in the early 2000 that general clauses will not suffice to protect the consumer efficiently, as they are too vague and leave too much discretion to the judge[8]. Let me illustrate the above by quoting here the provisions on unfair contract terms in consumer transaction. Art. 385^1 § 1 of the CC reads that "provisions of a contract executed with a consumer which have not been agreed individually are not binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice, grossly violating his interests (unfair contractual provisions). This does not apply to provisions setting forth the main performances of the parties, including price or remuneration, so long as they are worded clearly". This provision also refers to general clauses (good practice, gross violation of the consumer interests), but it is expanded in Art. 385^3, which enumerates contractual provisions that shall be treated unfair in case of doubt (so-called "grey list"). These are the provisions which especially: "1) exclude or limit liability towards the consumer for personal injury; 2) exclude or significantly limit liability towards the consumer for non-performance or improper performance of an obligation; 3) exclude or significantly limit a consumer's claim being set off against the other party's claim; 4) contain clauses which the consumer did not have the opportunity to become familiar with before the contract was executed; 5) allow the consumer's contracting party to transfer the rights and obligations under the contract without the consumer's consent; 6) make the execution of a contract conditional on the consumer promising to execute further contracts of a similar type in the future; 7) make the execution, content or performance of a contract conditional on execution of another contract that has no direct link to the contract containing the assessed provision <...> 23) exclude the jurisdiction of Polish courts or which refer the case to a Polish or foreign arbitration tribunal or another authority, or which require that the case be heard by a court which, according to the law, has no local jurisdiction".

As one can see, the list (which by the way is modelled on the list in the annex to EU directive 93/13/EEC) is long and detailed, and its wording does not resemble the rest of the provisions of the Civil Code which are far more concise. It seems that nowadays all lawyers are used to the wording of Art. 385^3 of the CC, but it is unusual when compared to other provisions of the CC[9] and at the beginning this provision raised some objections. It was observed, among other things, that it constituted a sort of surplus, because some of the clauses enumerated therein could be challenged based on already binding provi-

[8] *Łętowska E.* Prawo umów konsumenckich. 2nd ed. Warszawa: C. H. Beck, 2020. P. LXV.

[9] *Haberko J.* Nieuczciwe klauzule umowne w umowach konsumenckich zawieranych przy użyciu wzorca // Przegląd Sądowy. 2005. No. 11–12. P. 105.

sions[10]. The casuistic character of consumer law becomes even more evident when one looks at the application of those provisions in practice. Until 2016 it was the District Court in Warsaw that had the power to decide which particular contract terms used in consumer transactions were to be seen as unfair. Every potential consumer was entitled to file a lawsuit. On the basis of the rulings delivered by the aforementioned Court, a register of unfair contract terms held by the Competition and Consumer Protection Authority was created. In 2021, the number of clauses entered into this register exceeded 7750 items! Needless to say that such a register became illegible for both entrepreneurs and consumers. Hence, the casuistic approach intended to protect consumers in a more efficient way turned out to be counter-productive. This is why the law maker decided to change this system and vested the right to hold contractual provisions abusive to the President of the Competition and Consumer Protection Authority, which is done in an administrative procedure.

5. Scope of regulation

Despite the dispersed and caustic character of consumer law, one may try to make some general observations regarding its scope, the aim of the regulations and their main directions. There are some tendencies that may be seen both in the Civil Code and in sectoral provisions. From a perspective of a civilian, the consumer protection is effected on various levels.

First of all, it is granted to the consumer at the pre-contractual stage. The law maker is aware of the "deficit of information" on the consumer's side. The consumer is often unable to understand sophisticated contracts proposed to him/her. As mentioned, an "average consumer" is one who is well-educated. Here, public authorities and agencies launching many informational campaigns play an important role, but this does not change the fact that information provided by the entrepreneur before a transaction is executed is of key importance. The most general regulation is provided for in the Act of 23 August 2007 on unfair commercial practices. Pursuant to Article 4 sec. 1 of this act, market practice applied by traders towards the consumers is considered dishonest if it is contrary to good commercial practice, and distorts or may distort market behaviour of an average customer prior to conclusion of a contract related to the product, during its conclusion or following it. The provisions of this act are intended *inter alia* to protect the consumer against misselling practices consisting in providing false information or hiding relevant information at the pre-contractual stage.

The law maker focuses not only on preventing misselling practices but also on providing precise information necessary for a consumer to understand the proposed contract. There is a number of provisions imposing various obligations on the entrepreneurs to provide to the customer simple documents describing the proposed transaction in a clear and understandable way. In many cases, they stem directly from European law. It is worth giving some examples in order to illustrate the above. The Act of 30 May 2014 on consumer rights imposes several informational obligations on the entrepreneur, regarding the details of the proposed transactions and the identity of the entrepreneur. The Act of 12 May 2011 on consumer credit regulates in a very detailed way advertisement of such financial products and requires a lender or a credit intermediary to deliver to the consumer a set of precise data regarding the proposed contract. The Act provides for a template of an informational formular in order to make it easier for the consumer to understand the transaction. The Act of 16 September 2011 on timeshare reads in Article 9 that "prior to conclusion of a timeshare contract, a contract for a long-term holiday product, a resale or

[10] *Lemkowski M.* Materialna ochrona konsumenta // Ruch Prawniczy, Ekonomiczny i Socjologiczny. 2002. No. 3. P. 92.

an exchange contract, the trader is obliged to provide the consumer with detailed information on such a contract, within the scope defined in standard informational formulars, the templates of which are defined in appendixes <…> to the act respectively".

Secondly, there are many provisions of law that regulate the content of consumer contracts. Notwithstanding the provisions on the unfair contract terms, there are also many detailed requirements regarding particular contracts. The consumer credit may be used as a good example again, because the law maker caps the interest and other fees that may be charged to the consumer, regulates the consequences of payment of a credit in whole or in part before the lapse of the time limit defined in the contract, grants the consumer the right to terminate the contracts etc. At the same time, according to its Article 47, "contractual provisions cannot exclude or limit consumer rights provided for in the act. In such cases, provisions of the act shall apply".

Thirdly, requirements regarding the form of a contract, form of pre-contractual information or notices made after the transaction has been executed (for example to confirm its content) provided to customers play an important role. Legal scholars even talk about a renaissance of formalism in consumer transactions[11]. Their intention is to guarantee that information is provided to the consumer in a proper way. They also help identify in a clear way the undertaking entering into the transaction with the customer. There are many provisions regulating the form of communication and of transactions between a professional and a consumer. As a rule, the written form or other "durable mediums" fulfil the requirements set by the law maker (see for example Article 14 on the Act on Consumer Rights that reads that for contracts concluded outside the undertaking's seat, the trader is obliged to provide the consumer with information on the wording of the proposed contract, written on paper or, if the consumer agrees, stored on another durable carrier in a legible manner and expressed in simple language. The duty to use the Polish language in consumer transaction (Art. 7 of the Act of 7 October 1999 on the Polish language) corresponds with the above.

Last, but not least, the performance of consumer contracts is also of interest to the law maker. For example, the Energy Law Act of 10 April 1997 protects household customers from disconnection of energy or gas supplies in the event of delays in payments, requiring additional summoning (Art. 6b sec. 3) and preventing disconnection if the consumer makes a complaint to the energy company or starts an ADR procedure. The Act on consumer credit grants the right to the consumer to pay the credit in whole or in part before the lapse of the time limit defined in the contract, and regulates the consequences thereof in such a way that the total cost of the credit is decreased by the costs related to the time period by which the duration of the contract was shortened, even if the consumer incurred the cost before the payment (Art. 48 and 49). There are also regulations providing for a compulsory ADR procedure if the consumer requires so (see Art. 37 the Act of 5 August 2015 on complaints handling by financial institutions and the Financial Ombudsman).

6. Breaking up (?) with some principles of civil law

As is known, one of the principles of civil law is the freedom of contracts (Art. 353^1 of the Civil Code, quoted above). Freedom means at the same time responsibility for one's own acts. One can say that civil law is the law of free and responsible people, being autonomous in their decisions and bearing the consequences thereof. This assumption underlies many of other principles of civil law, having their roots in the Roman law, as *pacta sunt servanda*. When one looks at the key regulations of consumer law and the case law, one may wonder whether these principles are still valid in business to consumer dealings.

[11] *Grochowski M.* Wymogi formalne w umowach konsumenckich. Warszawa: C. H. Beck, 2018. P. 46–63.

As mentioned, the freedom of contracts has a narrower scope in consumer transactions than in other sort of dealings. There are many provisions of the law designed especially for consumer contracts causing that the parties do not enjoy the full freedom to negotiate their content. This approach stems from the assumption that the entrepreneur is able to impose unfavourable terms in a contract executed with a consumer and thus their provisions cannot be left solely to the parties.

As mentioned, the rule *pacta sunt servanda* (contracts must be kept) is also limited when it comes to a consumer contract. There are many provisions stating that a consumer who decided to enter into a contract with an undertaking has a right to withdraw from his/her decision without negative consequences. Such solutions are provided for example in the Act of 30 May 2014 on consumer rights and apply to distance contracts and off-premises contracts (Art. 27), and stem from Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. As observed in the doctrines, "the institution creates in the European Law an exception to the *pacta sunt servanda* rule. It is a characteristic institution, vital to consumer law, which revolutionizes traditional rules of civil law, granting the consumer (and only him/her) the right to [withdraw] from the transaction"[12]. There are also specific regulations regarding particular contracts, for example a consumer loan agreement (Art. 53 of the Consumer Credit Act). The purpose of these regulations is to provide to the consumer an additional "cooling-off period" (*tempus ad deliberandum*) allowing him/her to think over the transaction and decide whether to stay bound by it.

In the context of the above, consumer law remains a part of civil law; however, due to its underlying assumptions, it provides for many regulations that depart from the principles that "traditional" civilians are accustomed to.

7. Interaction between private and public law

As mentioned, this paper discusses the issue of consumer protection from the perspective of civil law. Obviously, civil law is not a separate island in the Polish legal system and interacts with public law in many aspects. Consumer protection constitutes one of the areas of such mutual influence. Let me give some examples. Public law regulations use the notion of "consumer" as defined in the CC. Public authorities react to infringements of consumer rights stemming from civil law regulations: for example, the President of Competition and Consumer Protection Authority imposes fines on entrepreneurs using unfair contract terms (in the meaning of the CC) in their dealings with consumers (Art. 23b of the Act of 6 February 2007 on Competition and Consumer Protection). On the other hand, public law regulations also have an impact on the construal and application of private law regulations. The said Act on Competition and Consumer Protection introduced in 2016 a new provision (Art. 24 sec. 2 point 4), saying that an infringement of collective consumer rights may consist in "offering consumers a purchase of financial services that do not correspond to their needs based on information available to the trader in regard to the characteristics of the consumers, or offering a purchase of these services in a way that is inappropriate in regard to their nature". Such a provision not only entitles the President of Competition and Consumer Protection Authority to start administrative proceedings against an entrepreneur breaching this provision, but also imposes general pre-contractual duties of financial institutions towards consumers (by the way expanded in some other legal provisions regarding e. g. banking or insurance activity). Another example is so-called "public compensation" that may be granted to consumers in a decision of the

[12] *Łętowska E.* Ochrona niektórych praw konsumentów. Komentarz. 3rd ed. Warszawa: C. H. Beck, 2001. P. 32.

President of Competition and Consumer Protection Authority issued against an entrepreneur infringing collective consumer rights. For example, in decision No. DDK-2/2015[13], which challenged a practice consisting in a unilateral amendment to contract conditions in a contract for satellite TV access services for a definite period, the entrepreneur was obliged by the President of Competition and Consumer Protection Authority to provide the following compensation to consumers (to choose from): for current clients: a voucher for 5 VOD films (available at: vod.pl), access to a new channel, decoder upgrade, and former clients: use of non-standard offer or refund of 43,16 PLN[14].

8. Protection of professionals

As mentioned, the definition of a consumer does not encompass professionals. Even the weakest entrepreneur does not enjoy consumer protection. However, there are some exceptions to this paradigm.

The most striking one is the new regulation of the Act of 31 July 2019 on amendments to certain acts in order to limit regulatory burdens. As of 1 January 2021, it has extended the provisions on the unfair contract terms (abusive clauses) that have been limited to consumers, onto individual entrepreneurs (being natural persons). Pursuant to the new Art. 385^5 of the CC, "provisions related to a consumer, provided for in Art. 385^1–385^3 [the ones relating to unfair contract terms], are applied to a natural person entering into a contract directly related to its business activity, when it arises from its wording that its character is not of a professional nature to this person, arising from the subject of the performed business activity in particular, made available on the basis of provisions on the Central Electronic Register and Information on Economic Activity".

It is worth noting that the first step in this direction was made in 2007 in the CC provisions on the insurance contract. Art. 805 § 4 of the CC introduced a rule stating that "Art. 385^1–385^3 apply accordingly if the policyholder is a natural person executing a contract related directly to his business or professional activity". As one can see now, this particular regulation, limited to an insurance contract, inspired the law maker to introduce a general rule applying to all sort of transactions. This solution does not infringe upon EU law. As CJEU confirms in its ruling of 2 April 2020, C-329/19, "Art. 1 (1) and Art. 2 (b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national case-law which interprets legislation intended to transpose that directive into national law in such a way that its protective rules of consumer law also apply to a contract between a seller or supplier and a subject of the law such as the condominio in Italian law, notwithstanding that such a subject of the law does not fall within the scope of that directive".

Presumably, we are witnessing the beginning of a new tendency consisting in expanding the application of some tools, designed originally to protect consumers, onto individual entrepreneurs. At this stage, it is not easy to foresee where it will lead us.

Insurance law is a good example also because of some other provisions. The amendments to the CC of 2007 introduced also the new wording of Art. 807 that states in § 1 that the general terms and conditions of insurance or provisions of an insurance contract con-

[13] Decision of the President of Competition and Consumer Protection Authority no. DDK 2/2015. Available at: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/43104c28a7a1be23c1257eac006d8dd4/6783b42eaf275745c1257ec6007ba8e7/$FILE/2015.03.27%20-%20C-%20zmiana%20cen%20-%20decyzja%20_wersja%20jawna_.pdf (accessed: 29.01.2022).

[14] A lively debate on public compensation started among lawyers in Poland, after the District Court in Warsaw had challenged in a recent ruling (ruling of 10 November 2021, case no. XVII AmA 4/20. Available at: https://www.saos.org.pl/judgments/453668 (accessed: 29.01.2022)) the reimbursement of fees awarded to consumers by the President of Competition and Consumer Protection Authority in his decision.

trary to the provisions of this title [Title XXVII. Insurance Contract] are invalid unless further regulations provide for exceptions. This rule is binding regardless the status of the policyholder. Thus, the law maker excluded the freedom of contracts from insurance law in order to protect all sorts of policy holders, not only consumers. The next step has been made in the Act of 15 December 2017 on Insurance Distribution. This Act changes the assumptions that up until now have constituted the basis for Polish legislation, whose aim is to protect the weaker party to an insurance relationship. The change arises from the definition of the "client", assumed in the act (and a number of provisions related to it, the aim of which is to ensure the client protection in the relation with an insurance distributor). Pursuant to Art. 3 section 1 point 10 on Insurance Distribution, a person is defined as a client in the following cases:

— insurance agreements — an insurance seeker, policyholder or insured;
— surety bonds — a principal.

Article 3 section 1 point 13 of the Act on Insurance Distribution defines "an insurance seeker" as a person who expressed their will towards an insurance distributor to take action in order to enter into an insurance agreement.

It should be highlighted that a client, within the meaning of the Act on Insurance Distribution, is both a consumer and any other professional client. This refers to any client, not only a sole trader but also a joint-stock company (!). The above actually means a revolution in insurance law or even civil law, because the Act on Insurance Distribution grants the client the sort of protection that has been so far limited to consumers.

Conclusions

The requirements stemming from consumer protection play an increasing role in the Polish legal system but they are difficult to reconcile with the traditional approach to the autonomy of the entities of civil law. The specific features of consumer protection regulations differ significantly from the traditional principles of civil law. Some scholars even doubt whether consumer protection law is still a part of civil law and compare it to labour law that derived from law of obligations but became a separate discipline. At this stage, such a conclusion would go too far in my view. At the same time, one has to be aware that the level of consumer protection is constantly being raised by the legislator, courts and public authorities. One of the most fascinating questions is where it will lead us to.

References

Gnela, Bogusława. 2013. *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym*. Warszawa, Wolters Kluwer Polska.

Grochowski, Mateusz. 2018. *Wymogi formalne w umowach konsumenckich*. Warszawa, C. H. Beck.

Haberko, Joanna. 2005. Nieuczciwe klauzule umowne w umowach konsumenckich zawieranych przy użyciu wzorca. *Przegląd Sądowy* 11–12: 95–112.

Habryn-Chojnacka, Ewa. 2016. Sprzedaż. *Kodeks cywilny. Komentarz*. In 2 vols, vol. II, ed. Maciej Gutowski: 392. Warszawa, C. H. Beck.

Kilian, Wolfgang. 2011. Consumer protection in the information and telecommunications technology sector. Current state and potential developments. *Potencjalne i rzeczywiste standardy ochrony prawnej konsumenta*, ed. Robert Stefanicki: 9–31. Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego.

Lemkowski, Marcin. 2002. Materialna ochrona konsumenta. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 3: 67–96.

Łętowska, Ewa. 2001. *Ochrona niektórych praw konsumentów. Komentarz.* 3rd ed. Warszawa, C. H. Beck.

Łętowska, Ewa. 2020. *Prawo umów konsumenckich.* 2nd ed. Warszawa, C. H. Beck.
Pazdan, Maksymiliam. 2012. Osoby fizyczne. *System Prawa Prywatnego*. In 20 vols, vol. I, ed. Marek Safjan: 1111. Warszawa, C. H. Beck.
Pecyna, Marlena. 2004. *Ustawa o sprzedaży konsumenckiej — komentarz*. Kraków, Zakamycze.

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Защита прав потребителей в соответствии с частным правом Польши

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Статья посвящена положениям польского частного права, направленным на обеспечение защиты прав потребителей. Особое внимание уделяется договорному праву, учитывается влияние публично-правовых норм на сферу гражданского права. Автор представляет ряд правовых инструментов, используемых в польском праве для обеспечения защиты прав потребителей в сделках с предпринимателями, и анализирует основные особенности польского законодательства о защите прав потребителей. Также рассматривается влияние права ЕС на польское законодательство. Польское законодательство о защите прав потребителей должно соответствовать директивам ЕС. Как известно, защита потребителей играет важную роль в законодательстве ЕС. Польский законодатель обязан надлежащим и своевременным образом внедрять европейские директивы в национальное законодательство. Многие польские нормативные акты, касающиеся защиты прав потребителей, по-видимому, являются своего рода переводом европейских директив. Это самый простой, но и самый рискованный метод переноса законодательства ЕС, поскольку может привести к несоответствиям с национальными нормативными актами. Видимо, такое положение дел вызвано жесткими сроками. В то же время общая компетенция Европейского союза по принятию законодательства о защите прав потребителей как части гражданского законодательства отсутствует. Это связано с тем, что шесть государств — основателей Европейского экономического союза сочли договорное право как часть европейских договоров излишним, поскольку правовые системы государств — основателей этого союза, основанные на римском праве, должны обеспечивать взаимопонимание. Очевидно, что потребитель нуждается в защите при взаимодействии с предпринимателями, поскольку является более слабой стороной сделки. Эта слабость проистекает главным образом из недостатка информации и низкой переговорной способности. Потребитель никогда не будет реальным партнером в переговорах с банком, коммунальной компанией или авиакомпанией.

Ключевые слова: потребитель, предприниматель, недопустимые условия договора, право на отказ от договора, обязательные положения, обязательства по предоставлению информации, дистанционный способ продажи товара, защита потребителей, частное право.

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