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A Basic Outline of Slovenian Consumer Protection with an Emphasis on Alternative Dispute Resolution

Abstract

Consumer protection today represents a modern segment of human rights, which in recent years has carved out a wider role in national, European and international law. The objective of this paper is to show the fundamental principles of consumer protection in the Republic of Slovenia, where intensive consumer protection began to take root after the country gained its independence in 1991. In the subsequent 25 years, numerous legal acts have been adopted and documents introduced which either in whole or in part address the protection of consumer rights. The foremost and most basic legal act is the Consumer Protection Act, which has been repeatedly amended and supplemented, with the intention that Slovenian legislation should follow and be harmonised (mainly) with European and international trends in consumer protection. The last important step was taken with the adoption of Out-of-Court Resolution of the Consumer Disputes Act, which entered into force on 14 November 2015. This Act has transposed in the Slovenian legal system Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

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JEL Classification: K15, K23.

1. Introduction

Consumer law in the Republic of Slovenia has in recent years rapidly gained in importance and strengthened its position in the Slovenian legal system. A number of legislative acts, which either entirely or partially extend into the field of consumer protection, have been adopted. The last such legislative act was one adopted in 2015. It provided the transposition of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (hereinafter: Directive 2013/11/EU) into the Slovenian legal system. Since the consumer is the weaker party, and often lacks a legal education or knowledge, activities aimed at raising awareness among consumers and ensuring their legal protection in the event of violations of their rights have increased in recent years in the Republic of Slovenia as well. Various government and private stakeholders are addressing these issues, in which they are brought together by their common aim – to better protect consumers. Consumer protection today is oriented towards alternative dispute resolution, which should also enable consumers to resolve their disputes with traders based on lower financial barriers (Primorac & Miletić 2016, p. 363).

2. Brief Historical Overview of Consumer Protection in the Republic of Slovenia

The first time "consumer" was mentioned officially in Slovenia was in 1955, when the Decree on Trade, Trade Businesses and Stores (*Uredba o trgovanju, trgovskih podjetjih in trgovinah*) was issued, amongst others establishing consumer councils. The councils were intended to strengthen social control in trade through participation of consumers. However, these councils were not very successful, since it was not completely clear what their tasks were supposed to be and what powers could actually be delegated to them. In practice, their function remained mainly advisory, and their operations led to no significant progress in consumer rights protection (Pernek 1981, pp. 194–201).

The next significant step towards more efficient protection of consumers was the SFRJ Constitution of 1974, which stated that local communities are

authorised to make decisions in order to pursue their common interests and satisfy common needs, including consumers' interests (Article 73). In 1989, amendments to the Constitution of 1974 deleted Article 73 and determined instead that the Republic of Slovenia shall ensure protection of consumers in accordance with its constitution and statutes. In the years following Slovenian independence, a number of sectoral acts were issued and/or amended with the express purpose of protecting consumers, but they did so only partially, each act only for its area of relevance, e.g. the Obligations Act (*Obligacijski zakonik*), the Trade Act (*Zakon o trgovini*), the Act Regulating Quality Control of Agricultural and Food Products in Foreign Trade (*Zakon o kontroli kakovosti kmetijskih in živilskih proizvodov v zunanjetrgovinskem prometu*), the Market Inspection Act (*Zakon o tržni inšpekciji*), the Standardisation Act (*Zakon o standardizaciji*).

1991 saw the establishment of the Slovene Consumer Association (*Zveza potrošnikov Slovenije* – ZPS), which has significantly contributed to raising awareness of consumer protection. ZPS edits the "ZPStest", a journal that provides modern consumers with independent information.

The already apparent need to protect consumer rights was therefore partially addressed in various acts and executive regulations, until a more comprehensive Consumer Protection Act (*Zakon o varstvu potrošnikov*, hereinafter: ZVPot) was adopted on 26 February 1998 (*Uradni list RS*/Official Journal RS, 20/98; amendments: 110/02, 14/03, 51/04, 98/04 (official consolidated version) 114/06; 126/07, 86/09, 78/11, 38/14, 19/15; 55/17) and became binding on 28 March 1998. The original wording of ZVPot from 1998 (*Uradni list RS* 20/98) did not yet contain a provision on out-of-court dispute resolution, which had only just begun to take root in Europe. In Slovenia, the first beginnings of alternative dispute resolution can be traced back to 1994, when the Ministry of Family approved the first project on mediation. The ministry responsible for family matters thereby supported the project *Pomoč staršem in otrokom ob razvezi z novo metodo – mediacijo* (Assistance for parents and children after a divorce with a new method – mediation). Within the framework of this project, the first mediators in family matters were trained in Slovenia. This project was followed by a pilot project of the Ljubljana District Court on alternative dispute resolution, which in 2001 constituted the second step in alternative dispute resolution in Slovenia.

The possibility of out-of-court resolution of disputes was therefore explicitly included in ZVPot only with subsequent amendments thereof (*Uradni list RS*, 38/14). We may thus conclude that the Republic of Slovenia had created the explicit legal basis for resolving consumer disputes with alternative (out-of-court) forms of dispute resolution prior to the adoption of Directive 2013/11/EU (comp. Article 43b(1)(11) and Article 48b(1)(4) ZVPot). The harmonisation with EU law

was achieved through amendments of ZVPot, which implemented provisions of directives into Slovenia's legal system. These include:

a) Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (*Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov* – ZVPot-D/the Act Amending the Consumer Protection Act – ZVPot-D: *Uradni list RS*, 86/09);

b) 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 (*Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov* – ZVPot-D/the Act Amending the Consumer Protection Act – ZVPot-D: *Uradni list RS*, 86/09);

c) Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC) (*Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov* – ZVPot-C/the Act Amending the Consumer Protection Act – ZVPot-C: *Uradni list RS*, 126/07);

d) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (*Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov* – ZVPot-D/the Act Amending the Consumer Protection Act – ZVPot-D: *Uradni list RS*, 86/09);

e) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (*Zakon o spremembah in dopolnitvah Zakona o varstvu potrošnikov* – ZVPot-F/the Act Amending the Consumer Protection Act – ZVPot-F: *Uradni list RS*, 38/14).

ZVPot is *lex specialis*, because the special rights of the consumer take precedence on the strength of the Obligations Code (Možina 2015, p. 16). At the same time ZVPot in its Article 37(4) in respect of liability for clerical errors refers to the use of Slovenian Obligations Code (CO): *Uradni list RS*: 97/07 – official consolidated version, 64/16. The Consumer Protection against Unfair Commercial Practices Act adopted in 2007 is a part of the consumer la regime (*Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami*: *Uradni list RS*, 53/07 – ZVPNPP). This legal act lays down the company practices and failings considered to be unfair commercial practices vis-à-vis consumers, and regulates administrative and judicial protection against unfair commercial practices vis-à-vis consumers (Article 1 ZVPNPP).

In 2010, the Consumer Credit Act was adopted (*Zakon o potrošniških kreditih*: *Uradni list RS*, 59/10, 77/11, 30/13, 81/15 in 77/16 – ZPotK-2). Additionally, various

general laws have been adopted. These laws relate to alternative dispute resolution, but they can also be used for consumer disputes: in 2008, the Mediation in Civil and Commercial Matters Act (*Zakon o mediaciji v civilnih in gospodarskih zadevah*: *Uradni list RS*, 56/08) and the Arbitration Act entered into force (*Zakon o arbitraži*: *Uradni list RS*, 45/08). These were followed in 2009 by the Act on Alternative Dispute Resolution in Judicial Matters (*Zakon o alternativnem reševanju sodnih sporov*: *Uradni list RS*, 97/09 in 40/12). *Lex specialis* laws governing certain specific areas of law have also been adopted, including ones containing provisions on the out-of-court resolution of consumer disputes. For example:

a) the Insurance Act (*Zakon o zavarovalništvu*: *Uradni list RS*, 99/10 – official consolidated version, 90/12, 56/13, 63/13, 93/15) – Article 217(2)(6);

b) the Financial Instruments Markets Act (*Zakon o trgu finančnih instrumentov*: *Uradni list RS*, 108/10 – uradno prečiščeno besedilo, 78/11, 55/12, 105/12 – ZBan-1J, 63/13 – ZS-K, 30/16 in 9/17) – Article 294 and 295;

c) the Patients' Rights Act (*Zakon o pacientovih pravicah: Uradni list RS*, 15/08 in 55/17) – Articles 2(9), 71, 72…;

d) the Energy Act (*Energetski zakon: Uradni list RS*, 17/14, 81/15) – Article 50.

There is a good deal in all that to potentially confuse everyday consumers, who can get lost in the multitude of legal acts regulating the protection of consumers, the hyper-regulation and attendant legal fragmentation, which can render consumer protection less effective (Knez 2016, p. 33).

A major step in the consumer protection arena was taken 21 October 2015, with the adoption of the Out-of-Court Resolution of Consumer Disputes Act (*Zakon o izvensodnem reševanju potrošniških sporov*: *Uradni list RS*, 81/15, hereinafter: ZIsRPS). With ZIsRPS, which entered into force on 14 November 2015, Directive 2013/11/EU was transposed into Slovenia's legal system, the objection of which is the creation of a Pan-EU framework for consumer dispute resolution and modernisation of the Consumer-to-Business (C2B) structures and bodies for dispute resolution in EU Member States.

3. The Main Bodies Responsible for Consumer Protection in the Republic of Slovenia

3.1. General Remarks

Persons who want to exercise their rights arising from various legal relationships and legal transactions in which they participate as consumers may enlist the assistance of various governmental and non-governmental bodies,

agencies and other organisations. Their common aims are, broadly speaking, to protect, educate and inform consumers, to monitor developments in the market and commercial practices that might violate consumer rights, and to take appropriate measures in cases of infringement of those rights. Until 2011, the following consumer protection actors were listed in ZVPot as those authorised to carry out certain tasks related to consumer protection: the Consumer Protection Office, consumer organisations, providers of consumer education and the Human Rights Ombudsman.

The Consumer Protection Office was one of administrative authorities within the Ministry of Economy. It was authorised to perform professional, administrative and development activities related to education and informing consumers about consumer protection and public service – Article 6 of the Decree on Administrative Authorities within Ministries (*Uredba o organih v sestavi ministrstev*: *Uradni list RS*, 35/15, 62/15, 84/16, 41/17 in 53/17). The Office was appointed to act as the single liaison office and worked as national contact point and coordinator of activities of competent authorities under Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

But in 2011, the Consumer Protection Office was abolished following some major changes in the organisation of public administration in the Republic of Slovenia, which also resulted in amendments to the ZVPot (Act Amending the Consumer Protection Act – ZVPot-E: *Uradni list RS*, 78/11). On 20 December 2011, functions and responsibilities of the Consumer Protection Office were thereby assumed by the Ministry of Economic Development and Technology (hereinafter: MEDT).

3.2. The Ministry of Economic Development and Technology (MEDT)

The Consumer and Competition Protection Division at the MEDT performs the following tasks:

– to plan and adopt consumer protection policies,

– to perform regulatory functions,

– to ensure the monitoring and harmonisation of regulations drawn up by other ministries in areas connected with consumer protection,

– to promote the development and operation of non-governmental consumer organisations,

– to ensure the implementation of public consumer advice, information and education services on the basis of public invitations to tender or concessions, etc. (Ministry of Economic Development and Technology 2016).

The European Consumer Centre Slovenia (hereinafter: ECC Slovenia), which has been a part of the network of European Consumer Centres since 2006, has also been working under the MEDT since 2014. It is tasked with providing advice and assistance to consumers who make purchases in other EU member states, in Norway, or Iceland, or who are travelling there and encounter problems when enforcing their rights with providers of goods and services.

On its website (http://epc.si/pages/en/about-us/ecc-slovenia.php), ECC Slovenia invites consumers to enlist its assistance if they need advice to help them avoid problems while purchasing and travelling across Europe and save unnecessary costs; if they want to know their rights in the event of problems with a cross-border purchase; if they need assistance contacting a trader based abroad; if they want to know how their complaint can be solved and what their rights and responsibilities in dispute resolution are; if they want to fill out an online complaint form whenever they cannot reach an agreement with a trader based outside their home country; if they need professional assistance in asserting their consumer rights and help with other cross-border purchase issues; or if they want to inquire about European and/or national consumer protection legislation. They are, however, not authorised to take legal or enforcement action against a trader or represent the consumer before court, and they cannot help consumers with commercial disputes, disputes involving state authorities, handle consumer complaints if the trader is based in the consumer's home country, or intervene if the trader is based outside the EU, Norway and Iceland. In 2015, the ECC Slovenia successfully assisted consumers in 220 cases/complaints, as well as consumers from other EU Member States (30 from 220) through cooperation with other members of the ECC network, in a number of cases related to consumer complaints (Evropski potrošniški center Slovenije 2016, p. 7).

3.3. Consumer Organisations

Consumer organisations are defined as organisations that are (1) registered as societies, institutes or other organisations that are not engaged in profitable activity; (2) established by consumers with the aim of protecting their rights; (3) recorded in the register of consumer organisations with the MEDT. In order to be entered into the register, such organisations must be neutral and independent from the interests of providers of goods and services, meaning that such organisations are not allowed to acquire any funds from providers of goods and services (Article 63 of ZVPot). Additional requirements (e.g. that the organisation must have suitably equipped business premises, an functioning website, and have publicly noted office hours, among other stipulations) and the procedure for entry into the register are regulated in detail by the Rules on the procedure

and requirements for entry of consumer organisations into the register (*Pravilnik o načinu vpisa in pogojih za vpis potrošniških organizacij v register*: *Uradni list RS*, 8/12).

In 2001, 12 consumer organisations were registered in the Republic of Slovenia. For financial reasons, the number of registered consumer organisations was significantly reduced over the years, to the great detriment of consumers (as it portends more limited competition). Nowadays, the role of business chambers (e.g. The Chamber of Craft and Small Business of Slovenia) and associations (e.g. Slovenian Advertising Chamber), which determine the level of consumer protection in the country with their codes, terms, conditions of business activity and arbitration is also important in the field of consumer protection (Osredkar 2001, p. 6). Currently (November 2017), the following consumer organisations are listed in the register with the Ministry:

a) the Slovene Consumer Association (Zveza potrošnikov Slovenije, hereinafter: ZPS) – the oldest and best-known consumer organisation in Slovenia is Slovene's Consumer Association, which was established in 1991. An independent, non-profit and internationally recognised non-governmental organisation, its main activities include informing, campaigning, advising, testing, educating and representing consumers, and international activities[1]. ZPS advises members and non-members, but also helps them with individual consumer-related problems and with the enforcement of their rights, especially in the areas of defective goods and products, prices for telecommunication services, unfair commercial practices, tourism and insurance, to name a few. It regularly participates in the legislative process for the adoption or amendment of any act relevant for consumers in the Republic of Slovenia, while its lawyers also represent members in court proceedings (if only in cases of important questions related to consumer rights).

ZPS is especially active online. Its website (www.zps.si) offers information on current topics, tests and comparisons of products (more than 3,000 products were tested in 25 years of its existence), warnings regarding dangerous products that have had to be removed from the market, product- and price-comparison tools (e.g. laptops, tuna fish, washing detergents). In 2015, more than 850,000 individuals visited their website. Internationally, ZPS has a very broad network and is a member or a partner in various international organisations and projects (e.g. the European Consumer Organisation – BEUC, Consumers International – CI, International Consumer Research and Testing – ICRT, the European Consumer Voice in Standardisation – ANEC, the Transatlantic Consumer Dialogue – TACD, European Food Safety Authority – EFSA, etc.);

[1] For details on ZPS's activities, see (*Zveza potrošnikov Slovenije* 2016).

b) International Consumer Research Institute (Mednarodni inštitut za potrošniške raziskave, hereinafter: MIPOR) – is a research institute that was established by ZPS (with the cooperation of the British Consumer Association) in 1993. MIPOR's main activities include: (1) comparative testing of goods and services in accordance with internationally accepted rules, such as neutrality and independence of organisations and individuals that perform the testing, as well as of publications that publish the results of the tests. In 2015, MIPOR conducted 38 tests on products including tuna fish, cheese, wooden pellets, laptops, diapers. Six of the tests were done in Slovenia while 32 were international tests; (2) publishing: together with ZPS, MIPOR regularly publishes a magazine ZPStest (previously VIP) with articles on various relevant topics, as well as various other educational publications; (3) research activity for Slovenia and Central and Eastern Europe: especially on food, accommodation policy, public services, quality of products and services, protecting e-consumers, health care, banking, the environment and tourism; (4) education: organisation of international seminars and domestic events for both adults and children[2];

c) the Gorenjska Consumers Association (Združenje potrošnikov Gorenjske) – The Association of Consumers Gorenjska is a regional organisation established to protect consumer rights (http://www.potrosnik-zdruzenjegor.si/).

3.4. Market Inspectorate of the Republic of Slovenia (MIRS)

The above consumer protection agencies have a broad range of measures and powers at their disposal. However, they are generally not empowered to impose sanctions on those who violate those rights. This authority is instead granted to the Market Inspectorate of the Republic of Slovenia (hereinafter: MIRS), which oversees the implementation of acts and regulations[3] adopted for protecting consumer rights (Article 70 of ZVPot) and the execution of Slovenian legislation governing consumer protection, product safety, trade, catering, crafts, services, pricing, tourism, competition protection and copyrights.

MIRS is affiliated with the MEDT, but operates independently and autonomously in the entire territory of the Republic of Slovenia. To effectively

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[2] For more details on MIPOR's activities, see (MIPOR 2016).

[3] In addition to ZVPot, these acts are: Rules on Price Indication for Goods and Services (*Uradni list RS*, 63/99, 27/01, 65/2003); Rules on goods to be covered by a warranty for proper operations (*Uradni list RS*, 73/03, 92/03); Consumer Credit Act, Official consolidated text (*Uradni list RS*, 77/04); Rules on the conditions to be met by credit intermediaries (*Uradni list RS*, 102/00); Order on the form and contents of the label showing compliance with the requirements of consumer crediting (*Uradni list RS*, 102/00); Average Effective Interest Rates Applying to Consumer Credits of Banks and Savings Banks (*Uradni list RS*, 66/04); Rules on the reporting of creditors with regard to conclusions of credit agreements and to the agreed effective interest rates (*Uradni list RS*, 75/04).

protect consumer rights through the surveillance of legal entities and the management of consumer complaints, MIRS has several measures in its arsenal, including administrative decisions forbidding the sale or advertising of a product or service and imposing fines on a legal entity if their behaviour, or failure to act, commits an offence. Anyone can notify MIRS about irregularities in the market. MIRS is then required to investigate such reports and to take appropriate action[4]. MIRS's scope of responsibility is continuously expanding, now including oversight of the implementation of Regulation (EC) No 2006/2004, which deals with consumer credit and unfair business practices[5].

In 2015, MIRS received 197 reports of violations under ZVPot (254 reports in 2014) and 60 reports of violations under the Consumer Protection against Unfair Commercial Practices Act (52 reports in 2014). On the basis of these reports, and in the framework of the surveillance actions, 10,754 inspections were performed in the area covered by ZVPot, and 147 administrative decisions and 1,377 admonitions were issued for violations. Inspectors also issued 152 decisions for minor offences and 188 payment orders. Especially problematic are cases of unfair commercial practices, unfair contract terms, seasonal sales, distance contracts, catalogues and other advertising materials of tourist agencies, warranties and instructions, consumer credits[6].

In addition to MIRS, other bodies may also encounter cases related to the protection of consumer rights and may exercise their powers and take measures in order to protect those rights, for example the Health Inspectorate, the Veterinary Administration, the Inspectorate for Agriculture, Forestry, Hunting and Fisheries, the Inspectorate for the Environment and Spatial Planning, and the Inspectorate for Electronic Communication and Electronic Signature.

4. Out-of-court Resolution of Consumer Disputes in Slovenia

In 2012, Slovenia adopted the Resolution on the National Program of Consumer Protection 2012–2017 (*Uradni list RS*, 47/12), hereinafter: ReNPVP12-17 2012. It emphasises that Slovenia's consumers cannot gain extensive expertise based on

[4] See also Market Inspectorate of the Republic of Slovenia, http://www.ti.gov.si/en/areas_of_work/consumer_protection.

[5] Ministry of Economic Development and Technology, Biennial Report (Article 21 of Regulation (EC) No 2006/2004) of 13 March 2013, http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/docs/cpc_biennial_2013_sl_en.pdf (accessed: 8.08.2016).

[6] For more, see Market Inspectorate of Republic of Slovenia, Business Report for 2015, http://www.ti.gov.si/fileadmin/ti.gov.si/pageuploads/dokumenti/TirsPoslovnoPorocilo2015.pdf (accessed: 8.08.2016).

which they could make reasonable purchase decisions for every occasion, nor do they have the time to become fully informed about market supply (*caveat emptor*) (Trstenjak, Knez & Možina 2005, p. 29). The increased need for consumer protection results from many factors: the integrity and complexity of markets and market relations, deregulation trends, the opening up of markets, globalisation of supply and demand, the increased cross-border purchase of goods and services, technological development (the possibility of distance selling, especially of online shopping, cashless transactions, shorter product life), the growing number of products and services whose quality is almost impossible to assess at the time of purchase (for example, electricity, healthcare services, insurance, investments, internet services, etc.). As a result, purchasing decisions depend mainly on one's trust in a brand and/or trader. Moreover, the importance of the services sector, including financial, consulting and other services, is likewise increasing. All of these factors result in consumers being insufficiently aware of their rights and therefore unable to effectively protect them (ReNPVP12-17 2012).

Since access to legal protection constitutes a fundamental right, enshrined under Article 23 URS (also Article 6 ECHR), Slovenia is obliged to ensure proper judicial protection in the field of consumer protection. The exercise of this fundamental right can be guaranteed both in judicial and alternative dispute resolution procedures. Alternative dispute resolution is especially important for consumer protection, because traditional litigation is often not the most suitable form, considering the relatively low economic value of a dispute and the difference in economic strength of the parties, legal knowledge and experience (ReNPVP12-17 2012). In 2012, Slovenia thus resolved to regulate alternative dispute resolution for consumer protection.

Slovenia adopted ZIsRPS, which transposed Directive 2013/11/EU into the country's legal system. On 21 May 2013, Regulation (EC) No 534/2013 on online dispute resolution for consumer disputes (hereinafter: Regulation 534/2013) was adopted as well. Directive 2013/11/EU and Regulation 534/2013 are two interrelated and complementary legal instruments (Grgurić 2014, p. 24), which strive to bolster EU consumer protection. The objective of Directive 2013/11/EU is to establish a Pan-EU framework for consumer dispute resolution and the modernisation of C2B structures and bodies for dispute resolution in the EU Member States (Hodges & Creutzfeldt 2013). It is among the measures intended to strengthen the EU internal market by protecting consumers and providing access to ADR (Creutzfeld 2016, p. 2).

On 14 November 2015, when ZIsRPS entered into force, Slovenia fulfilled the objective established by ReNPVP12-17 from 2012. ZIsRPS regulates out-of-court settlement of domestic and cross-border disputes arising from contractual relationships between traders and consumers, resolved through

mediation (also adjudication and arbitration) by the body conducting out-of-court resolution of consumer disputes. ZIsRPS also sets out the principles and general rules of procedures for out-of-court resolution of consumer disputes and rules and conditions of operation for persons conducting out-of-court resolution of consumer disputes (Article 1 ZIsRPS). However, the following disputes are explicitly excluded from ZIsRPS' scope:

1) disputes brought by the trader against the consumer;

2) disputes relating to the provision of healthcare services, including the prescription, dispensation and provision of medicinal products and medical devices where these are provided to the patient by healthcare workers and associates;

3) services provided by non-economic services of general interest (Article 3 ZIsRPS). Comparison of Article 3 ZIsRPS and Article 2 (2) of Directive 2013/11/EU leads to the conclusion that Directive 2013/11/EU excludes a broader area from its scope in comparison with Article 3 ZIsRPS. Namely, Article 2(2) provides that Directive 2013/11/EU does not apply to: "(…) (a) procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader, unless Member States decide to allow such procedures as ADR procedures under this Directive and the requirements set out in Chapter II, including the specific requirements of independence and transparency set out in Article 6(3), are met; (b) procedures before consumer complaint-handling systems operated by the trader; (c) non-economic services of general interest; (d) disputes between traders; (e) direct negotiation between the consumer and the trader; (f) attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute; (g) procedures initiated by a trader against a consumer; health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices; (i) public providers of further or higher education".

In Article 4(1) ZIsRPS defines the following terms for its own purposes:

a) a consumer is a natural person who acquires or uses goods and services for purposes outside of their professional or gainful activities;

b) a trader is a natural or legal person who performs gainful activities, irrespective of their legal form. Obligations of a trader under this law shall also apply to other legal and natural persons not engaged in gainful activity if they provide goods and services to consumers;

c) a domestic consumer dispute is a dispute arising from a contractual relationship between a trader and a consumer, whereby at the time of ordering goods or services the consumer resided and the trader was established in the Republic of Slovenia;

d) a cross-border consumer dispute is a dispute arising from a contractual relationship between a trader and a consumer, whereby at the time of ordering goods or services the consumer resided within the EU Member State and the trader was established within the Republic of Slovenia;

e) a procedure for out-of-court resolution of consumer disputes is a procedure in which one or more independent third persons resolve a domestic or cross-border consumer dispute;

f) a body conducting out-of-court resolution of consumer disputes is a permanently established body governed by public or private law in the Republic of Slovenia that provides the resolution of domestic and cross-border consumer disputes using the procedure from paragraph e and is entered in the register of persons who conducting out-of-court resolution of consumer disputes in accordance with Article 35 ZIsRPS;

g) a person conducting proceedings with the body conducting out-of-court resolution of consumer disputes is a person conducting proceedings for the out-of-court resolution of consumer disputes or a person deciding proceedings with a binding decision;

h) a person involved in proceedings with the body conducting out-of-court resolution of consumer disputes is a person involved in proceedings for out-of-court resolution of consumer disputes or a person deciding proceedings in a senate with a binding decision;

i) online sales or online service is a sales contract or a service contract where the trader, or the trader's intermediary, has offered goods or services through a website or by other electronic means, and the consumer has ordered those goods or services on that website or by other electronic means;

j) an online consumer dispute resolution platform is a single point of entry for consumers, established under Regulation 524/2013/EU for the resolution of disputes arising from online trade or online services between the consumer residing and the trader established in the European Union.

According to ZIsRPS, a trader who is a legal person is considered to be established in a place which is entered in the business register as its seat, or where its management body has its seat, or where it has a business unit, branch or agency. A sole trader is considered to be established where he or she has his or her place of business (the second paragraph of Article 4 ZIsRPS). A body conducting out-of--court resolution of consumer disputes governed by private law is considered to be established where it carries out activities of out-of-court resolution of consumer disputes, while a body governed by private law is considered to be established in the place which is entered in the business register as its seat (the third paragraph of Article 4 ZIsRPS).

The person, who by the provider of out-of-Court resolution of consumer disputes conducts or participates in procedures for the settlement of consumer disputes, must be professional, independent and impartial (Article 5 ZIsRPS). Thus, Directive 2013/11/EU as well as ZIsRPS see in guaranteeing the principle of professionalism one of the basic criteria and the essential conditions for successful out-of-court settlement of consumer disputes. Directive 2013/11/EU emphasises that it is essential for the successful activity of the system of alternative dispute resolution (Grgurić 2014, p. 24). Especially to provide the necessary confidence in its procedures, it is essential that the natural persons in charge of alternative dispute resolution possess the necessary expertise, including a general knowledge of the law. But Slovene ZIsRPS does not determine what is meant by "general knowledge of the law" (Pogorelčnik Vogrinc 2015, p. 261). In particular, those natural persons should have sufficient general knowledge of legal matters in order to understand the legal implications of the dispute, without being obliged to be a qualified legal professional (36 of Directive 2013/11/EU). Directive 2013/11/EU thus explicitly obliges EU Member States to ensure that the natural persons in charge of alternative dispute resolution should possess the necessary expertise, which comprises the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of law (Article 6(1)(a) Directive 2013/11/EU). The Slovenian legislature, on the strength of its professionalism, went a step further than Directive 2013/11/EU. In Article 27, the ZIsRPS sets down that the person who as the provider of the out-of-court resolution of consumer dispute resolution conducts the process of the out-of-court resolution of consumer disputes, must be qualified for its management. He or she will have acquired legal knowledge from an accredited programme leading to a second degree law degree; or his or her level of education in law acquired after study programmes in accordance with the law regulating higher education corresponds to the level of education of at least the second degree (Article 27(1-2) ZIsRPS). Based on the above we conclude that Slovenian ZIsRPS requires legal education as a condition for managing the out-of-court resolution of consumer disputes. However, it is not necessary for the person to pass the state law exam. Croatian draft Law on Alternative Resolution of Consumer disputes, which is intended to carry out the implementation of the Directive 2013/11/EU in Croatian law, has no such article, which would determine the legal education a person must possess in order to lead out-of-court settlement of consumer disputes (Ministarstvo gospodarstva 2015, p. 11).

Elsewhere in Europe, even Germany is considering tightening up the credentials one must have to preside over out-of-court settlement of consumer disputes. In fact, German legal proposals are going even one step further than the Slovenian legislation: The person to preside over out out-of-court settlement

of consumer disputes should be, according to the German proposal, a "Volljurist", which means, according to Slovenian law, one who, in addition to possessing a legal education, has passed the state law exam. In Germany's thinking, only the Volljurist can ensure the legality of consumer disputes presidings, which often adjudicate extremely complex disputes and often do not differ from court proceedings (Tonner & Berlin 2014, p. 33).

The Slovenian legislature justified the *ratio* it employed to tighten the qualifications one must possess (the necessity of legal education) after ZIsRPS (and in Germany) as compared with Directive 2013/11/EU, which prescribes only minimum standards (Pogorelčnik Vogrin 2015), by citing the complexity of legal relationships, in which the definition of the legal issues often requires the legal qualifications of the contractor out-of-court resolution of consumer disputes is implemented. In addition to a law degree, the person should also have accumulated sufficient experience in out-of-court or judicial resolution of consumer disputes. The requirements have been made so stringent in order to ensure greater consumers derive greater benefits and have them protected (Republika Slovenija – Ministrstvo za gospodarski razvoj in tehnologijo 2015, p. 46). Individuals presiding over out-of-court resolution of consumer disputes may have the stingency of the requirements relaxed if a dispute involves more people. In this case, ZIsRPS does not require all persons involved to have a legal education. The person should have at least a diploma of the first cycle study programme or an education obtained by study programmes, which must be in accordance with the law governing higher education, and must correspond to the level of education at least of the first cycle study programmes (Article 27(3) ZISRPS).

5. Conclusions

The dynamics of human life bring with them rapid development and new challenges in consumer protection. While at the time of its independence in 1991 Slovenia took significant consumer protection measures, this protection continues to receive insufficient attention. After all, consumer protection concerns each of us as we step into the role of consumer, which occurs almost every day. Thanks to the preponderance of information today, particularly online, the modern consumer is informed, yet still not enough. Consumers remain unable to find, choose, evaluate and apply relevant information, and they can likewise struggle to distinguish between legal and lay. All these circumstances generate conflicts that consumers can resolve in different ways, in or out of the courts, th latter option of which is gaining in popularity. Slovenia has adopted ZIsRPS 2015, which represents the transposition of Directive 2013/11/EU, the Slovenian legal order, thereby fulfilling

the primary goal pursued in 2012 with ReNPVP12-17 2012. This is aim is fulfilled but there are open questions and problems which will have to be solved in the coming years.

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Zarys ochrony konsumenta w prawie słoweńskim ze szczególnym uwzględnieniem pozasądowych metod rozstrzygania sporów
(Streszczenie)

Ochrona konsumenta stanowi obecnie nowoczesny dział praw człowieka, który w ostatnich latach zaczął odgrywać coraz ważniejszą rolę w prawie krajowym, europejskim i międzynarodowym. Celem artykułu jest przedstawienie podstawowych zasad ochrony konsumenta w Słowenii. Po uzyskaniu przez ten kraj w 1991 r. niepodległości następował intensywny rozwój ochrony praw konsumentów, w ciągu 25 lat przyjęto liczne akty prawne i wprowadzono dokumenty, które w całości lub w części dotyczyły tego zagadnienia. Najważniejszym i najbardziej podstawowym aktem prawnym w tym zakresie jest ustawa o ochronie konsumentów, która była wielokrotnie zmieniana i uzupełniana, tak aby zapewnić słoweńskiemu prawodawstwu harmonizację głównie z europejskimi standardami i zgodnie z międzynarodowymi tendencjami w zakresie ochrony konsumentów. Ostatni ważny etap stanowiło przyjęcie ustawy o pozasądowym rozstrzyganiu sporów konsumenckich, która weszła w życie 14 listopada 2015 r. Ten akt prawny stanowił implementację do słoweńskiego prawodawstwa dyrektywy 2013/11/UE w sprawie alternatywnych metod rozwiązywania sporów konsumenckich.

Słowa kluczowe: ochrona konsumenta, pozasądowe rozstrzyganie sporów, Unia Europejska, Słowenia.

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Consumer Protection under Directive 2015/2366 on Payment Services in the Internal Market – Selected Issues

Abstract

Directive 2007/64 on payment services (PSD 1) introduced protection for consumers of payment services. First and foremost, the consumer should receive the basic information required by law before and after the execution of a payment. Secondly, the consumer is made more familiar with the charges incurred when paying in shops, including online shops. Third, PSD 1 provided the protection of consumer rights in the event of unauthorised or incorrect charges to the consumer's payment account. Fourthly, within PSD 1 the market for payment systems was opened, thus allowing entities other than banks to provide payment services. In order to protect consumers' money, these new institutions have become subject to regulation (supervision).

The European Union legislator, when establishing a new framework for the provision of payment services in the European Union (PSD 2), reached the conclusion that existing protection for the consumer – the payment service user, was insufficient. Therefore, new legal instruments protecting the consumer have been introduced. However, upon examination a conclusion has been reached that while some of the protections should be accepted, others warrant critical review.

Keywords: PSD 1, PSD 2, payment services, consumer protection in payment services, strong authentication, strong consumer authentication (SCA).

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1. The Adoption of Directive 2015/2366 on Payment Services (PSD 2)* and the Importance of the Changes for the Consumer in Relation to Directive 2007/64 on Payment Services (PSD 1)**

1.1. Consumer Protection in PSD 1

PSD 1 ensured uniformity of the rules on electronic payments, e.g. payments by debit cards or cash transfers in 31 European countries[1]. This means that payments can be performed throughout Europe as easily and safely as in one's own country. The directive identified in detail the information that the consumer receives and ensured that payments are made in a faster and more secure way. In addition to banks, it enabled new entities – payment institutions (or the providers of mere money remittance service – in Poland, the offices of payment service providers) to provide payment services after obtaining the appropriate permit/registration from the supervisory authority.

All types of electronic and cashless payments, from transfer orders, direct debits, card payments (including payments made using debit and credit cards), through money remittance services to mobile payments and online payments are covered by PSD 1. However, this directive does not cover payments by cash or check.

Directive 2007/64 on payment services made it easier for the user, including the consumer, to understand information regarding payment in several ways.

First, consumers must receive the basic information they need before as well as after payment is made. Before a consumer uses the service, the payment service provider should present him with its specific conditions, including the information about the provider, the elements of the payment service (such as the procedure for consenting to the transactions), the time of the implementation of the service, any spending limits, charges and information regarding rights to receive refunds. This makes it easier for the consumer to compare available options and select the offer which most suits his needs. The consumer must also be informed of any changes to the framework agreement, including any changes in fees, at least two months in advance. In addition, after each payment, the consumer receives

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* Directive of the European Parliament and of the Council (EU) 2015/2366 of 25 November 2015 on payment services in the internal market amending Directives 2002/65/EC, 2009/110/EC, 2013/36/EU and Regulation (EU) No 1093/2010 and repealing Directive 2007/64/EC (the Official Journal of the European Union of 23 December 2015).

** Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and repealing Directive 97/5/EC (the Official Journal of the European Union of 5 December 2007).

[1] In the European Union, Norway, Liechtenstein and Iceland.

a statement listing the amount, date, and charges so that he can verify that the transaction has been completed correctly.

Second, the consumer receives more information regarding charges incurred in shops, including online shops. Payees (merchants)[2] can give discounts to consumers who pay for purchases in a manner that is more favourable to the merchant (e.g. debit cards). Merchants may also impose higher charges on the consumer for payments which force higher costs on the merchant (e.g. using business cards) – also known as surcharges – if not prohibited or restricted by national law[3].

Third, PSD 1 provided protection of consumer rights in the event of unauthorised or incorrect charges to the consumer's account. In this case, consumers are eligible for a refund in three different situations:

1) unauthorised charges – when the consumer becomes aware of unauthorised debiting, he is entitled to an immediate refund, provided that he has reported it to his payment service provider as soon as possible, and within the deadline not exceeding 13 months from the date of debiting;

2) overstatement of charges – when the consumer has authorised a payment transaction, without specifying the amount at the time of the authentication (e.g. by direct debit or payment by credit card for booking a hotel) and the actual amount of the debit charged significantly differs from what could reasonably be expected, the consumer is entitled to contest this amount by contacting the payment service provider within eight weeks. The payment service provider should then provide either the refund within ten days or the reasons for refusing to provide it;

3) incorrect processing – if the consumer has authorised a transaction, but the payment service provider makes an error processing the payment (e.g. did not process the payment, debited the account an incorrect amount, processed the payment late or more than once) the consumer can contest the error within 13 months and obtain appropriate compensation.

Fourth, PSD 1 has opened the market of payment systems, allowing entities other than banks (e.g. entrepreneurs and telecommunication entrepreneurs providing payment remittances) access to the payment service market. In order to protect consumers' money, these new institutions have become subject to regulation (supervision).

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[2] The merchant, according to art. 2 point 1b of the PSA, is a recipient other than a consumer, to whom the settlement agent provides payment service.

[3] In Poland the PSA does not expressly prohibit (charges) surcharges.

1.2. Consumer Protection in PSD 2

PSD 2, which should be transposed into national law by 13 January 2018, on the one hand, has repeated the abovementioned instruments of protection in relation to the consumer, and, on the other hand, has introduced the following new regulations in respect to PSD 1:

1) the introduction of new payment services and new types of payment service providers resulting in increased competitiveness for the benefit of consumers;

2) new exceptions in the application of PSD 2 (which clarify the existing exemptions and grants control to national supervisory authorities over entities claiming these exclusions);

3) the prohibition of surcharges when using payment cards with a regulated level of interchange fees[4];

4) lowering the level of responsibility borne by the payment service provider, from EUR 150 to EUR 50, in the case of an unauthorised payment transaction[5];

5) increasing consumer protection in cases of card-based payment transactions where the exact transaction amount is not known at the time the payer gives consent to execute the payment transaction, for example when at automatic fueling stations, when signing car rental contracts or when making hotel reservations[6];

6) the obligation to introduce a method of accurate verification of the authorised consumer (payer).

The selected new instruments which provide legal protection to consumers introduced by PSD 2 are the subject of this article.

It is worth noting that consumer protection in the payment market is also regulated in Poland by the Consumer Rights Act[7]. Nevertheless, the application of this regulation is limited due to the provisions included in art. 4 paragraph 2 of the Consumer Rights Act[8].

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[4] Regulation of the European Parliament and of the Council (EU) 2015/751 of 29 April 2015 on interchange fees for card-based transactions (Journal of Laws of the European Union of 19 May 2015), http://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32015R0751&from=EN. Cf. more (Byrski, Sytniewski & Marcinkowska 2015).

[5] See the official press reports: http://europa.eu/rapid/press-release_MEMO-15-5793_en.htm.

[6] Recital 75 of PSD 2. The payer's payment service provider should be able to block funds on the payer's payment account only if the payer has given consent for the exact amount of the funds to be blocked.

[7] The Act of 30 May 2014, Consumer Rights (i.e. Journal of Laws of 2017, item 683, as amended).

[8] The regulation stipulates that provisions of the act shall not apply to agreements for payment services, except distance contracts.

2. The Term "Consumer" and "Payment Service Provider" and the Capital Requirements in Respect of the Providers, as a Part of Consumer Protection

2.1. The Term "Consumer" in Payment Service Act and PSD 2

In accordance with art. 4 point 20 of PSD 2, "consumer" means a natural person who is acting in payment service contracts for purposes other than his or her trade, business or profession[9].

Recital 53 of PSD 2 states that because consumers' and businesses' (enterprise') circumstances differ, they do not need the same level of protection. While it is important to guarantee consumers' rights by unwaivable provisions in a contract, it is reasonable to let enterprises and organisations make other arrangements provided they are not dealing with consumers. Member States should be, nevertheless, able to introduce a provision[10], under which micro-enterprises, as defined in Commission Recommendation 2003/361/EC[11], are treated in the same way as consumers[12].

The Polish legislature did not introduce an extended definition of what was considered a "consumer" in the Payment Services Act[13]. Hence, for the purposes of said Act, the definition of "consumer" should be understood as defined in art. 22 [1] of the Civil Code[14] – the "consumer" shall be understood as a natural person performing an act in law not directly related to his business or professional activity.

2.2. The Term "Payment Service Provider" in the Payment Service Act and PSD 2

Payment services are defined in the closed catalogue provided for in art. 3 paragraph 1 point 1–7 of PSA[15]. However, the Payment Services Act itself does not contain a definition of the term "payment service". The literature indicates

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[9] Similarly, art. 4 point 11 of PSD 1.

[10] PSD 1 provided for the possibility for the Member States to apply the rules protecting consumers also in respect to micro-enterprises (art. 30 paragraph 2 and art. 51 paragraph 3 of PSD 1).

[11] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003H0361.

[12] Similarly, recital 20 of PSD 1.

[13] The Payment Service Act of 19 September 2011 (i.e., Journal of Laws of 2016, item 1997, as amended), hereinafter: PSA.

[14] The Act of 23 April 1964 Civil Code (i.e., Journal of Laws of 2016, item 380, as amended).

[15] The enumeration is modelled on the annex to the PSD 1.

that there are approved financial services that constitute payment services and unapproved services and activities which, despite having features of payment services, are not considered as such, and, therefore, entities providing them will not be considered payment service providers.

The first of the above payment services described is the service of operating a payment account for the purpose of receiving cash deposits and making cash withdrawals from a payment account, and for any action necessary for maintaining such an account. Payment services also cover activities related to the transfer of funds into the payment account at the user's provider or at a different provider, so that this service can be conducted by executing direct debits, including one-off direct debits, or through the use of a payment card or a similar payment instrument or by providing transfer orders services, including standing orders.

Another payment service described is the performing of payment transactions, including an amount of cash made available to the user on credit[16]. The issuing of payment instruments, including credit cards, is also considered a payment service (Korus 2012, p. 29)[17].

An acquiring service is a payment service provided by settlement agents[18], which consists of enabling the execution of payment transactions by a merchant or through the latter, by means of the payer's payment instrument (e.g. by a credit card), in particular, consisting of handling the authentication, transferring to the issuer of the payment card or payment systems the payment orders of the payer or a merchant, in order to provide the merchant with the funds due to him, with the exception of activities involving the clearing and settlement within the framework of the payment system under the act on settlement finality.

Money remittances constitute another payment service, one which makes it possible to transfer money directly to the recipient or to a payment service provider that receives the funds for the recipient; after the transfer, funds are available to the recipient. Such remittance services transfer to the recipient, or to another provider that receives the funds for the recipient, cash received from the payer or of receiving the funds for the recipient and of making them available to the recipient. This service can be rendered by the offices of payment services[19].

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[16] And in case of a payment institution or an electronic money institution, a short-term loan.

[17] Payment instrument, in accordance with art. 2 point 10 of the PSA, shall be understood as "a personalised device or the set of procedures agreed by the user and the provider, used by the user to make a payment order".

[18] According to art. 2 point 1a of the PSA, the settlement agent shall mean a provider established in the provision of payment services as referred to in art. 3 paragraph 1 point 5 of the PSA.

[19] Cf. more broadly (Zalcewicz & Bajor 2016, p. 95). Money remittance service is rendered without operating a payment account for the payer.

The last payment service is a service performed only with the use of ICT. It involves the execution of payment transactions where the consent of the payer to execute a transaction is provided using a telecommunication, digital or IT device and the payment is transferred to the provider of telecommunication, digital or IT services, acting only as an intermediary between the user commissioning the payment transaction and the recipient[20].

The activity related to the provision of payment services may be, in accordance with art. 4 paragraph 1 of PSA, carried out exclusively by payment service providers[21]. Moreover, payment institutions (and other payment service providers) are obliged to have holdings of initial capital set by law[22]. These regulations may be understood as an additional consumer protection because PSD 1 and PSD 2 are fully harmonised directives and all Member States shall write similar provisions into their domestic law systems[23].

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[20] PSD 2 eliminated this payment service (there will apply general regulations concerning payment services), introducing, in turn, the exclusion to the payment transactions carried out by the provider of the network or electronic communications services, provided – alongside electronic communications services – for networks or services subscriber: (i) for purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content and charged to the related bill; or (ii) performed from or via an electronic device and charged to the related bill within the framework of a charitable activity or for the purchase of tickets; provided that the value of any single payment transaction referred to in points (i) and (ii) does not exceed EUR 50 and: – the cumulative value of payment transactions for an individual subscriber does not exceed EUR 300 per month, or – where a subscriber pre-funds its account with the provider of the electronic communications network or service, the cumulative value of payment transactions does not exceed EUR 300 per month (art. 3 point l of PSD 2).

[21] The provider may only be: 1) a domestic bank, within the meaning of art. 4 paragraph 1 point 1 of the Act on Banking Law (The Act of 29 August 1997 on Banking Law (i.e. Journal of Laws of 2015, item 128, as amended), hereinafter: Banking Law); 2) a branch of a foreign bank, within the meaning of art. 4 paragraph 1 point 20 of the Banking Law; 3) a credit institution within the meaning of art. 4 paragraph 1 point 17 of the Banking Law and, accordingly, the branch of a credit institution within the meaning of art. 4 paragraph 1 point 18 of the Banking Law; 4) an electronic money institution; 5) a branch of the provider of postal payment services, rendering services in the Member State other than Poland, in accordance with the law of that Member State, authorised under the law of that Member State to the provision of payment services and the Polish Post Joint Stock Company (Poczta Polska Spółka Akcyjna) – to the extent to which separate provisions authorise it to provide payment services; 6) payment institution; 7) the European Central Bank, the Polish National Bank, and the central bank of another Member State – when not acting as monetary authority or public administration bodies; 8) a public authority; 9) the cooperative savings and credit union or the National Cooperative Savings and Credit Union within the meaning of the Act on Cooperative Savings and Credit Unions – to the extent to which separate provisions authorise them to provide payment services, 10) payment services office. Cf. more broadly (Grabowski 2012, p. 44).

[22] The amount of initial capital is regulated by art. 7 of PSD 2.

[23] Art. 107 of PSD 2.

In the course of completing legislative work on PSD 2, the continuous development of the types of payment services was pointed out. These include the emergence of the service of payment initiation or the services that allow access to a payment account held by the payment service provider[24]; is being provided by so-called Third Party Services Providers (TPP).

Currently, among the EU supervisory authorities and courts, there is no unified position on the legality of such services. Divergent interpretations are mainly due to the risk of the service provider acquiring data access to a payment account (e.g. username and password to e-banking), in violation of the agreement between the payer and the bank and in violation of certain legal provisions (e.g. in Poland – art. 42 paragraph 2 of PSA).

It must be stressed, however, that the European Central Bank (ECB), on the basis of PSD 1, consents to the provision of "payment account access services" and "payment initiation services". The ECB indicates in PSD 1 that "From a European perspective, payment account access services are rapidly gaining importance and payment initiation services are already among the most important payment methods for e-commerce in some Member States (…) The recommendations should not be interpreted as a warning against established TPPs in Europe. TPPs fill a gap by providing efficient and customer-convenient e-commerce services"[25]. On the another hand, accordingly, in its judgment of 20 July 2014, the Dutch court for Midden-Nederland, in the case ING Bank N.V. v. AFAS Software BV stated that AFAS acted unlawfully by asking clients on their website to provide access data to their bank accounts.

PSD 2 introduces these two new payment services and in the transitional provisions prohibits the introduction of the restrictions until the regulations of PSD 2 have been implemented into national law[26].

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[24] Commission Staff Working Document {SWD(2013) 289 final} Annex 4: Background on market actors and payment methods Main actors in the market; source: http://ec.europa.eu/internal_market/payments/docs/framework/130724_impact-assessment-full-text_en.pdf (accessed: 31.12.2017).

[25] *Final Recommendations for the Security of Payment Account Access Services Following the Public Consultation*, https://www.ecb.europa.eu/pub/pdf/other/pubconsultationoutcome201405securitypaymentaccountaccessservicesen.pdf (accessed: 31.12.2017), pp. 3 and 5.

[26] On November 18, 2013 the Financial Supervision Authority, on its website, published a "Warning against allowing brokers access to bank accounts in online payments" (http://www.knf.gov.pl/Images/KNF_podawanie_danych_dostepu_do_rachunku_18_11_2013_tcm75-36300.pdf) (accessed: 31.12.2017), in connection with the identified practice of banks disclosing customers logins and passwords to entities other than their banks which maintain their accounts. On 14 July 2014 the Financial Supervision Authority published on its website the information "The risk associated with providing the login details to bank account to another bank" (https://www.knf.gov.pl/knf/pl/komponenty/img/KNF_podawanie_danych_dostepu_do_rachunku_18_11_2013_36300.pdf) (accessed: 31.12.2017). Both of these publications indicate the prohibition of customers disclosing data.

3. The Requirement of Strong Authentication of Transactions and the Principle of the Provider's Liability for Unauthorised Transactions as Elements of Consumer Protection

3.1. Strong Consumer Authentication

One of the basic goals of PSD 2 is to increase the level of consumer protection, particularly in the area of electronic payments. As indicated by recital 7 of PSD 2: "In recent years, the security risks relating to electronic payments have increased. This is due to the growing technical complexity of electronic payments, the continuously growing volumes of electronic payments worldwide and emerging types of payment services. Safe and secure payment services constitute a vital condition for a well-functioning payment services market. Users of payment services should therefore be adequately protected against such risks".

Such a goal is reflected in, among others, PSD 2 provisions in respect of strong authentication and in the light of a broadened scope of responsibility on the part of the payment service providers for unauthorised payment transactions. The implemented regulations are, in practical terms, one of the most significant changes posed by PSD 2 for payment service providers in the field of consumer protection[27].

3.2. Consumer Authentication in PSD 1 and the Payment Services Act

In the European legal order, following the provisions of PSD 1 and the Payment Services Act that implements it, the responsibility for unauthorised payment transactions (i.e. those to which the user did not consent – e.g. payment transactions made using data stolen by malware) is in principle borne by the payment service provider (e.g. the bank). The user is responsible for unauthorised payment transactions in exceptional cases, in particular, when he neglects the obligations set forth in the framework agreement regarding the security of the payment instrument and the protection of the "security" of this instrument (passwords, PIN codes). The consumer (payer) should also take adequate care associated with their use but within the limits required for the "normal" reasonable payer. According to recital 72 of PSD 2, "in order to assess possible negligence or gross negligence on the part of the payment service user, account should be taken of all of the circumstances. The evidence and degree of alleged negligence should generally be evaluated according to national law".

However, while the concept of negligence arises from the failure to act with due diligence, gross negligence should be considered as more than mere negligence

[27] In terms of the relationship between payment service providers with the entrepreneur, these regulations may, in principle, be excluded in the framework agreement.

and should refer to a procedure in which there was a significantly higher degree of negligence on the part of the user; for example, when storing credentials used to authorise the payment transaction in the vicinity of a payment instrument, in an explicit form easily recognisable to third parties. Contractual terms and conditions relating to the provision and use of a payment instrument, the effect of which would be to increase the burden of proof that rests on the consumer or to reduce the burden of proof that rests on the issuer, should be considered null and void. Moreover, in specific situations, in particular where the payment instrument is not available at the point of sale, as is the case with online payment, it should be noted that the burden of proof of submitting evidence of alleged negligence lies with the payment service provider because in such cases the payer has very limited means to do so.

Basically, the payment service provider is, in principle, burdened with the obligation to equip the payment instrument, e.g. electronic banking services with the appropriate mechanisms to ensure the security of transactions (i.e. to ensure that they can only be made when authorised – namely when the payer gives his or her consent). The bank must prove that the payment transaction was authenticated by the user (art. 45 of PSA). This solution is pro-consumer.

PSD 2 maintains the above principle of the responsibility of the payment service provider for unauthorised payment transactions, and additionally reduces the limit from EUR 150 to EUR 50. Moreover, the current provisions impose on payment service providers the obligation to properly secure cash deposits and credentials. These obligations stem from the Payment Services Act and, when the payment service provider is a bank, additionally from provisions set down in the Banking Law.

The duty to provide security for the payers' credentials and cash has been further specified at the recommendation of the Financial Supervision Authority[28] on the security of online transactions (implementation of the guidelines of SecuRePay[29] and the European Banking Authority[30]). Recommendations have been issued

[28] Recommendation concerning the security of payment transactions performed online by banks, national payment institutions, electronic money institutions, national and cooperative savings and credit unions of 17 November 2015, issued by the Financial Supervision Authority, https://www.knf.gov.pl/knf/pl/komponenty/img/REKOMENDACJA_dot_bezpieczenstwa_transakcji_platniczych_43526.pdf (accessed: 31.12.2017).

[29] Recommendations for safety of online payment of 31 January 2013, issued by the European Forum for Security of Retail Payments (SecuRePay – European Forum on the Security of Retail Payments), https://www.ecb.europa.eu/pub/pdf/other/recommendationssecurityinternetpayment-soutcomeofpcfinalversionafterpc201301en.pdf (accessed: 31.12.2017).

[30] Final guidelines on the security of online payments of 19 December 2014, issued by the European Banking Authority (hereinafter: EBA), https://www.eba.europa.eu/documents/10180/934179/EBA-GL-2014-12+%28Guidelines+on+the+security+of+internet+payments%29_Rev1 (accessed: 31.12.2017).

pursuant to art. 137 section 5 of the Banking Law[31], art. 102 paragraph 2 of PSA and art. 62 paragraph 2 of the Act on Cooperative Savings and Credit Unions[32].

The vast majority of the doctrine states that the Financial Supervision Authority is a body authorised to enact internal law by means of resolutions, in particular with regard to the recommendations set forth in banking law (Bączyk 2000, pp. 30–32; Fedorowicz 2013, p. 38; Tupin 1998, pp. 8–9; Kawulski 2013, pp. 573–574). The argument in favour of the organisational subordination of banks to the Financial Supervision Authority is perceived to be a functional relationship. Although banks and other financial institutions are entities essentially independent of the Financial Supervision Authority, what bonds them together is that the supervisory authority has extensive powers to influence their legal status.

The Constitutional Court held that the criterion of "organisational subordination", the fulfillment of which conditions the admissibility of the enactment of the internal law, must be understood more broadly than "hierarchical subordination" in the sense adopted in administrative law[33]. In addition, it is further argued that it is reasonable that the supervisory authority constituted "the implementing provisions" because it has the knowledge and professional competence to determine the content of the regulations that bind the supervised entities[34].

The recommendations of the Financial Supervision Authority are directed at the activities of banks, national payment institutions, national electronic money institutions and cooperative saving and credit unions. They oblige the application of so-called strong authentication for online transactions, yet this does not include mobile transactions and payments made via telephone, voice mail and SMS

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[31] On 1 November 2015 the Banking Law stripped the Financial Supervision Authority of the authority to issue resolutions other than recommendations. Up to 31 October 2015, the Financial Supervision Authority issued resolutions on the basis of, among others, Banking Law (art. 9f, 9g, art. 71 paragraphs 4–5 and 8, art. 92b paragraph 3, art. 127 paragraph 5, art. 128 paragraph 6 point 3, art. 128 paragraph 8, art. 137 point 1a), which have since been replaced by the statutory delegation to issue regulations by the minister responsible for financial institutions. Currently, pursuant to art. 137 paragraph 1 point 5 of the Banking Law, the Financial Supervision Authority may issue recommendations on best practices of prudent and stable management of banks. The Financial Supervision Authority still has the power to issue resolutions which do not constitute recommendations based on the Act on Mortgage Bonds and Mortgage Banks (art. 11 and art. 24 paragraph 6) and the Act on Trading in Financial Instruments (art. 74 paragraph 8, art. 81g paragraph 5).

[32] Act of 5 November 2009 on Cooperative Savings and Credit Unions (Journal of Laws of 2013, item 1450 as amended).

[33] This view is still valid despite the repeal in the Banking Law of the power to issue resolutions by the Financial Supervision Authority, because this power has been left in other statutes regulating the financial market. Similarly, as it seems, P. Wajda (2009).

[34] Currently, the power to issue regulations by the minister responsible for financial institutions in many cases is manifested after the consultations with the Financial Supervision Authority.

technology. From their perspective, strong authentication is a procedure with the use of two or more of the following items classified as:

a) knowledge – something that only the user knows (the element of user's knowledge/user's memory, e.g. a static password, PIN),

b) possession – something that only the user has (equipment/device held by the user, e.g. a token/code generator, smart card, mobile phone), and

c) customer feature (a specific individual feature characteristic of the user, for example, a biometric characteristic such as a fingerprint).

In addition, the selected items must be mutually independent in the sense that a breach of security of one does not violate another (the other). At least one of the elements should be impossible to reuse and recreate (except for the characteristics of the client), and also be unsusceptible to undisclosed and unauthorised interception via the Internet. Moreover, the procedure of strong authentication should be designed in a manner that protects the confidentiality of credentials.

These recommendations impose on payment service providers a number of additional obligations designed to improve the safety of users of internet banking including consumers. These obligations include:

– a regular review of security policies of online payment services,

– carrying out a detailed evaluation of the risks regarding the safety of online payments and services related to these payments before they are implemented, and regularly after their implementation,

– the introduction of rules governing monitoring and procedures in case of security incidents,

– the use of adequate security measures,

– raising customer awareness about safely using Internet payment services, the burden of which has been shifted onto the payment service providers, including banks.

The obligation of applying the mechanism of strong authentication resulting from the recommendations is not absolute, due to the principle of "comply or explain" that has been adopted. It is therefore possible to waive the application of the recommendations of the Financial Supervision Authority and explain the reasons for non-compliance.

This state of affairs will change after the implementation of PSD 2, which imposes on payment service providers an obligation to use a strong authentication mechanism when the payer:

a) gains access to his or her payment account online,

b) initiates an electronic payment transaction,

c) carries out the operation using a remote channel, which may involve a risk of payment fraud or other abuses.

3.3. Strong Consumer Authentication in PSD 2

When establishing a new framework for the provision of payment services in the European Union, the EU legislature took the position that the existing protection offered to the consumer-payment service user was insufficient. This is mainly because most of the commonly used payment instruments are currently based on new technologies, and, moreover, these tools operate in an online environment (mobile applications, e-banking) or they are based on remote access (e.g. telephone banking). The increase in convenience for the consumer due to the use of Internet/remote payment instruments is, nevertheless, accompanied by higher risks.

PSD 2 extends the obligation to use the strong authentication mechanism on such operations as:

– initiating electronic payment transactions online – which also includes payment transactions using mobile applications that are excluded from the recommendations of the Financial Supervision Authority;

– carrying out operations using a remote channel (e.g. telephone, SMS, electronic channels – without the parties being physically present) that may pose a risk of payment fraud or other abuse, which are excluded from the recommendations of the Financial Supervision Authority.

In contrast to the applicable regulations (the Payment Services Act and recommendations of the Financial Supervision Authority), PSD 2 also details a more regulatory technical standard for mechanisms of strong authentication, which will be required from payment service providers. According to art. 98 of PSD 2, the proper body to develop regulatory technical standards (RTS) is the European Banking Authority (EBA), in cooperation with the European Central Bank. The regulatory technical standards should be developed by 13 January 2017 in consultation with the relevant stakeholders, including actors from the payment services market. In addition, these standards should be regularly reviewed. Currently, the regulatory technical standards are still in development and under consultation. The last consultation paper of 12 August 2016 is available on the website of the European Banking Authority[35]. The consultations proceeded until 12 October 2016. Final regulatory technical standards should be issued concerning the method of strong authentication.

The introduction of PSD 2 and its implementation in the future will not affect the validity of the recommendations of the Financial Supervision Authority. Payment service providers will still be bound by them, unless they are repealed

[35] https://www.eba.europa.eu/documents/10180/1548183/Consultation+Paper+on+draft++RTS+on+SCA+and+CSC+%28EBA-CP-2016-11%29.pdf/679054cf-474d-443c-9ca6-c60d56246bd1 (accessed: 31.12.2017).

due to the EBA adopting the RTS. In this context, it should be noted that PSD 2 differs from the recommendations of the Financial Supervision Authority: It does not impose on payment service providers the obligation that at least one of the elements used for strong authentication should not be possible to reuse and recreate (except for the characteristics of the client). Moreover, during the authentication, there is no reason that these elements cannot be disclosed and acquired without authentication via the Internet and should also be impossible to an undisclosed and unauthorised acquisition via the Internet[36]. Therefore, the requirements resulting from the recommendations of the Financial Supervision Authority and PSD 2 do not overlap in every aspect. The recipients of the standards contained in PSD 2 and in the recommendations of the Financial Supervision Authority should, therefore, take particular care to ensure the content of these two regulations are in line with each other, when preparing to implement strong authentication mechanisms.

After the adoption of regulatory technical standards it would be desirable, *de lege ferenda*, to repeal the recommendation of the Financial Supervision Authority, so that the Polish payment service providers are not forced to comply with a number of overlapping, but not always consistent regulations. The regulatory technical standards should, in fact, in the light of PSD 2, set a uniform level of technical standards for strong authentication throughout the entire European Union.

4. The Prohibition to Exclude or Limit the Liability of the Payment Service Provider who Uses Outsourcing for Damage Caused to the Consumer

4.1. The Prohibition to Exclude or Limit the Liability in Outsourcing in the Payment Services Act

Under the Polish legislation, art. 18 paragraph 2 of PSD 1 (currently art. 20 paragraph 2 of PSD 2) was implemented in art. 88 paragraph 1 and 2 of the PSA[37], according to which the national payment institution in the provision of payment services and in carrying out business activity of issuing electronic money shall be liable to users or holders of electronic money for the actions of its agents and other entrepreneurs, through which it provides payment services or makes redemption of electronic money, and for the entities performing operations on the

[36] Cf. the definition of strong authentication contained in the recommendations of the Financial Supervision Authority.

[37] Art. 84–90 of PSA shall apply to offices of service providers that can provide payment services through an agent and delegate to another entrepreneur the performance of specific operational activities related to the provision of payment services (art. 121 of PSA).

basis of the agreement referred to in art. 86 paragraph 1, as for its own actions. This liability cannot be excluded or limited, unless the liability for a failure or improper execution of a payment transaction is excluded in case of force majeure or if the failure or improper performance of a payment order is due to other legal provisions. The payer's payment service provider should assume liability for a correct payment execution, including, in particular, liability for the full amount of the payment transaction and for the time of the execution, as well as full liability for any failure (act or omission) of outsourcing partners at the subsequent stages of the payment chain up to the recipient's account.

If the account of the recipient's payment service provider is not credited with the full amount or if the full amount credited is delayed, the payment service provider of the payer should correct the payment transaction or, without undue delay, refund to the payer (including the consumer) the appropriate amount of the transaction. The payment service provider cannot exclude or limit this liability in relation to the payment services user, including the consumer.

4.2. The Prohibition to Exclude Liability in Outsourcing in PSD 2

In accordance with art. 20 paragraph 2 of PSD 2, "Member States shall require that payment institutions remain fully liable for any acts of their employees, or any agent, branch or entity to which activities are outsourced"[38]. This principle of liability applies whether the client is a consumer or an an entrepreneur.

PSD 2 explicitly states that it only applies to the contractual division of liability between the payment service user and the payment service provider, yet it also indicates that the payment service provider that does not bear liability will receive compensation for losses incurred or sums paid under the provisions concerning liability[39]. It seems that on this basis, the Polish legislature has introduced in art. 88 paragraph 3 of PSA a commitment that the liability of an agent and other entrepreneurs cannot be excluded or limited, through which the national payment institution provides payment services as well as the liability of the entity performing operational activities under the agreement referred to in art. 86 paragraph 1, vis-à-vis the national payment institution for the damage caused to the user as a result of non-performance or improper performance of the agreement referred to in art. 84 paragraph 2, or the agreement referred to in art. 86 paragraph 1.

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[38] Similarly, PSD 1 in art. 18 paragraph 2, "Member States shall require that payment institutions remain fully liable for any acts of their employees, or any agent, branch or entity to which activities are outsourced".

[39] Recital 87 of PSD 2, as well as recital 47 of PSD 1.

Thus, any modification of unlimited liability of the outsourcing partner vis-à-vis the payment service provider for damage caused to the users (including consumers) is not permitted. It seems that such wording of art. 88 paragraph 3 of the PSA goes too far for two reasons. First, it prevents any restriction of the upper limit of the liability of the outsourcing partner, or the exclusion of the liability for ceased profits (*lucrum cessans*). Further, recital 87 of PSD 2 *in fine* states that further entitlements – except for losses suffered or sums paid – relating to recourse claims and the details of their content and the manner of pursuing them in connection with an improperly provided payment transaction should be the subject of consultation. These consultations shall take place between the outsourcing partner and the payment institution, and, thus, cannot be imposed by mandatory provisions[40]. Second, art. 92 paragraph 1 of PSD 2 relating to the right of recourse restricts this exclusion to cases where an unauthorised transaction took place within the definitions of art. 73 of PSD 2 or the transaction was not performed or an improper or delayed payment transaction took place, but not in all cases when using the services of subcontractors. There are also cases when the services of outsourcing partners are used concerning, for example, the services of contractual storage of archival data, whose improper performance does not affect the performance or a proper payment transaction, or its delay.

4.3. De lege ferenda Call in the Framework of Implementing PSD 2

In summary, there should be a *de lege ferenda* call in the framework of implementing PSD 2, to amend art. 88 paragraph 3 of the PSA, in order to reduce the instances of prohibiting the exclusion or limitation of the liability of the outsourcing partner in respect of the payment institution, on the one hand, only for the losses incurred or the sums paid by this institution, and, on the other hand, only to the actions/omissions of the outsourcing partner involved in the payment transaction. Such a change to art. 88 paragraph 3 of the PSA has no bearing on the legal position of consumers (the users of payment services), in relation to whom the payment institution always accepts unlimited liability for the acts or omissions of an outsourcing partner.

5. Conclusions

The European Union legislature, when establishing a new framework for the provision of payment services in the European Union (PSD 2), concluded that the existing protection for the consumer, the user of payment services, was

[40] Cf. more broadly the arguments in favour of such a possibility (Byrski 2015, pp. 113–124).

insufficient. It therefore decided to take three measures: First, to maintain the principle that the payment service provider was liable for unauthorised transactions but with a reduction in the amount of the liability from EUR 150 to EUR 50. Second, it introduced a ban on surcharges on payment cards with a regulated level of interchange fees. Third, it introduced the restriction that the payer's payment service provider would be able to block funds on the payer's payment account only if the payer has consented – using a method of strong consumer authentication – to have an exact amount of funds blocked.

Regarding the provisions concerning the prohibition of excluding or limiting the liability of an outsourcing partner in relation to the payment service provider, this ban should be limited only to losses incurred or the sums paid by the provider and only to the actions/omissions of the outsourcing partner involved in the payment transaction. This change to the Payment Service Act would not affect the legal position of the consumer (payment service user), in relation to whom the payment service provider always accepts unlimited liability for the acts or the omissions of an outsourcing partner.

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Ochrona konsumenta w drugiej dyrektywie w sprawie usług płatniczych (2015/2366/UE) – wybrane zagadnienia

(Streszczenie)

Dyrektywa 2007/64/WE w sprawie usług płatniczych (PSD 1) uregulowała kwestie ochrony konsumentów w zakresie usług płatniczych. W pierwszej kolejności należy wskazać, że konsument uprawniony został do otrzymywania wszelkich niezbędnych informacji przed wykonaniem konkretnej transakcji płatniczej, jak i po jej wykonaniu. Po drugie, konsument powinien zostać zaznajomiony z wszelkimi opłatami, które jest zobowiązany ponieść za płatności dokonywane w sklepach, w tym w sklepach internetowych. Po trzecie, PSD 1 zapewniła ochronę praw konsumentów w przypadku nieautoryzowanych lub nieprawidłowych opłat naliczanych na konsumenckim rachunku płatniczym. Po czwarte, w ramach PSD 1 nastąpiło otwarcie rynku usług płatniczych, co umożliwiło podmiotom innym niż banki świadczenie usług płatniczych. W celu należytej ochrony pieniędzy konsumentów przedmiotowe instytucje poddane zostały szczegółowej regulacji (nadzorowi).

Prawodawca unijny, ustanawiając nowe ramy świadczenia usług płatniczych w ramach Unii Europejskiej (PSD 2), doszedł jednak do wniosku, że istniejąca ochrona konsumenta – użytkownika usług płatniczych, jest niewystarczająca. Z tego też względu zdecydował się na wprowadzenie nowych instrumentów prawnych, których zadaniem jest wzmocnienie tej ochrony. Po dokładnym ich przeanalizowaniu wydaje się, że część z nich należy ocenić pozytywnie, niemniej w stosunku do pozostałych regulacji należy podnieść uwagi krytyczne.

Słowa kluczowe: dyrektywa PSD 1, dyrektywa PSD 2, usługi płatnicze, ochrona konsumenta usług płatniczych, silne uwierzytelnianie, silne uwierzytelnianie klienta.

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Protecting Consumers as the Buyers and Users of Cosmetic Products in the Light of European Parliament and Council Regulation (EC) No 1223/2009 on Cosmetic Products

Abstract

The article focuses on the legal classification of cosmetic products and the protection of consumers as the buyers of cosmetics products. Provided under the international and the national legal systems, the protection is guaranteed by two equally valid legal bases: the Regulation of the European Parliament and of the Council (EC) of 30 November 2009, No 1223/2009 on cosmetic products and the Act of 30 March 2001 on cosmetic products. Due to the practical difficulties that attend classifying a product as a cosmetic or otherwise, the issue of determining the similarities and differences between a cosmetic product, a medicinal product and a medical device are discussed. Reference is made also to the issue of the qualifications of the persons providing cosmetic services, and who apply cosmetic products, and the liability that falls upon these individuals.

Keywords: cosmetic product, medicinal product, consumer, end user.
JEL Classification: K15.

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1. Introduction

Due to their statutorily designated purpose, cosmetics require special regulations. Because humans apply them directly to themselves, user safety must be assured. In the current legal state, the issues relating to cosmetic products are regulated by two legal instruments: the Regulation of the European Parliament and of the Council (EC) of 30 November 2009 No 1223/2009 on cosmetic products and the Act of 30 March 2001 on cosmetic products. Because the regulation is applied directly, the provisions of the Act on cosmetic products apply only to a marginal extent. Both international and national legislation differentiates, apart from cosmetic products, medicinal products and medical devices. Because of their similar scope of application, medicinal products are often wrongly classified as cosmetics or vice versa. Moreover, there are cases of unauthorised use of drugs to perform cosmetic services. This may make the cosmetic service performed with the use of a medicinal product threatening to the health of the consumer. The service may also exceed the competence of the person providing the service. This may introduce a level of chaos that must be cleared up. Protecting buyers of cosmetic products is crucial both on account of the scope and manner of protection resulting from the regulation as well as the general protective principles stemming from the Civil Code and consumer protection law.

2. Cosmetics Law – a Historical Overview

The cosmetic products market developed rapidly in the second half of the twentieth century. New cosmetics categories prompted the need for common European regulations on cosmetic products. The result of the work undertaken was the European Council Directive of 27 July 1976 harmonising the national legislation of the Member States – Directive 76/768/EEC on the approximation of the laws of Member States relating to cosmetics products (Cosmetics Directive). Although the Cosmetics Directive has been amended on several occasions and from 2013 was replaced by the Cosmetics Regulation, the mere idea of adopting it was important. The primary purpose of the Cosmetics Directive was to protect public health. Its preamble stressed that this protection must take into account economic and technological requirements. In this perspective, it emphasised the importance of the economic side of the cosmetics market, which, as it was soon to become clear, was one of the fastest growing European markets (Borkowski 2015, p. 40).

Another equally important objective of the Directive was to harmonise the regulations and to establish common rules in respect of the ingredients, labelling and packaging of cosmetic products. It was of utmost importance that the

Cosmetics Directive introduced a definition of a cosmetic product. Appendix I, which contained an illustrative list of cosmetic products, divided into respective categories, clarified the definition. The text of the document referred to the safety of cosmetic products and Appendix II set forth the substances whose use was banned. In the opinion of the European Economic and Social Committee on the Regulation of the European Parliament and of the Council on cosmetic products COM (2008), 49, it was indicated in the final version, in point 3.1, that one of the objectives of transforming the Cosmetics Directive and replacing it with a new act of law was to eliminate legal uncertainties and inconsistencies resulting from the numerous amendments. Due to the considerable number of amendments, there had arisen a need to introduce a new form of regulation. In connection with the work undertaken, the Cosmetics Directive ceased to apply. It was replaced by the Regulation of the European Parliament and of the Council (EC) of 30 November 2009 No 1223/2009 on cosmetic products. The choice of the regulation was not accidental, as in section 2 of the introduction it was shown that it is a document that does not provide Member States with the possibility of diverging transpositions of clear and detailed provisions of the Regulation.

In the Polish legislation, as in the EU legislation, Regulation 1223/2009 is of utmost importance for cosmetics products. At the same time, when the Cosmetics Directive was still valid, in 2002, the Act of 30 March 2001 on cosmetic products entered into force[1]. Due to the legal nature of Regulation 1223/2009, all internal regulations, including in particular the provisions of the Act on cosmetics, apply currently only to the extent that they are not contrary to EU legislation and in the area not regulated by the Regulation. Because the provisions of the Act on cosmetics were based on the Cosmetics Directive, their significance is presently strongly marginalised because the Regulation entered into force.

3. The Concept of a Cosmetic Product in the European Legislation

3.1. General Remarks

Though the Cosmetics Directive is no longer binding, it was the first legislation to define a cosmetic product: "a cosmetic product was any product intended for contact with the external parts of the human body (skin, hairs, nails, lips and external genital organs) or with the teeth and mucous membranes of the oral cavity

[1] The Act came into force in 2002, repealing an earlier act of law, dating back to before the Second World War, namely the Regulation of the Minister of Social Welfare of 18 January 1939, which was issued in consultation with the Minister of Industry and Trade on the supervision over cosmetics products and their circulation, Journal of Laws 1939, No 13, item 72.

with a view exclusively or mainly of cleaning, perfuming them or protecting them in order to keep them in good condition, change their appearance or correct body odours" (art. 1 of the Cosmetics Directive). Its complement was Appendix I, which contains an illustrative list of cosmetics by category.

The Act on cosmetics of 2001, modelled on the Cosmetics Directive, does not use the term "cosmetic product" but rather a "cosmetic", which, according to art. 2 paragraphs 1 is "any chemical substance or mixture, intended for external contact with the human body: skin, hair, lips, nails, external genital organs, teeth and mucous membranes of the oral cavity, where the sole or primary purpose is to keep them clean, care for, protect, perfume them, change the appearance of the body or improve its smell".

Because Regulation 1223/2009 on cosmetics entered into force, the binding definition is that of a "cosmetic product" contained in this Regulation. According to art. 2 paragraph 1 point a of Regulation 1223/2009, "a cosmetic product means any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours". This definition differs minimally from the definition of the cosmetic products contained in the Cosmetics Directive. The main difference comes down to the precise definition of the concept of a cosmetic product by showing the two basic forms one can take: a substance or a mixture. Consequently, according to art. 2 paragraph 1 point b of the Regulation, "a substance means a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition". In turn, the definition of a mixture is a logical-linguistic error which causes it not to entirely explain the essence of a mixture, defining it by a pleonasm as follows: "mixture" means a mixture or solution composed of two or more substances (art. 2 paragraph 1 point c). According to the preamble to the Regulation, the term "mixture" should have the same meaning as the term "preparation" previously used in the Community legislation. Referring to the Cosmetics Directive, the term "preparation" was used twice there: first, in the introduction, in which it was indicated that the Directive does not apply to pharmaceutical preparations; and second, in art. 5a point 1, which referred a cosmetic ingredient as, among others, a chemical preparation of synthetic or natural origin, which is part of the cosmetic product. As M. Borkowski pointed out (Borkowski 2015, p. 48), the term "preparation" under the Cosmetics Directive is closer to the concept of a substance

under Regulation 1223/2009, while a cosmetic product can only be a "substance" or a "mixture". In addition, the Regulation uses the term "ingredient of a cosmetic product" to refer to the extended group of obligations regarding the provision of information on cosmetic products (art. 19 paragraph 1 point g).

The definition of a cosmetic product highlights three basic elements, namely product forms, the place of application of the product and the aim of its use. From the perspective of the form, a cosmetic product is a substance or a mixture. The cosmetic product defined in such a manner may be used only for external contact with the human body or parts of the mouth, whereas the catalogue of applications is closed, just like the catalogue of the basic functions of the cosmetics (Starzyk & Zachwieja 2010, p. 20–21). The primary function of the cosmetic product may be to clean one's body, to care, protect, perfume or change the appearance of the body or to improve body odour. In addition to the functions indicated in the definition of a cosmetic product, Cosmetics Regulation 1223/2009 does not refer directly to other functions of the cosmetic product than those set forth above. In turn, in art. 19 relating to the labelling of the cosmetic products, it is indicated that the containers and outer packaging of the cosmetic product should contain information about the product's function (art. 19 paragraph 1 point f). The same provision excludes the need to place information about the function of the product when that information results from the product's presentation.

3.2. Cosmetic Products, Medicinal Products, Medical Devices and Biocidal Products

In addition to the basic functions arising from the definition of a cosmetic product, additional functions may also come into play, e.g. bacteriostatic action or controlling glands, for example with antiperspirants. A cosmetic product may not be used to treat or prevent diseases or function as a biocide. In addition, a cosmetic cannot be used to modify physiological functions of the body, for example, fat reduction or weight loss, since these are reserved for medicinal products.

The overlap between what constitutes a cosmetic product and what a medicinal product is recognised in the Cosmetics Directive, the preamble to which indicates that its scope concerns only cosmetics, and not pharmaceutical or medicinal products. Therefore, it stresses the need to determine the scope of the application of the Directive by distinguishing firmly between cosmetics and medicinal products. This limit was determined by the exact definition of cosmetics, which related both to the place as well as to the purposes of their use. In addition, the preamble of the Directive clearly set forth that the Directive did not apply to products which meet the definition of a cosmetic product but are exclusively intended to protect from disease.

In this regard, paragraph 6 of the preamble to the Regulation 1223/2009 is crucial. It highlights that the Regulation applies only to cosmetic products and not to medicinal products, medical devices or biocidal products. The paragraph indicates that this delimitation follows from the detailed definition of cosmetic products, which refers both to the areas of their application as well as to the purposes of their use. In addition, it was indicated that the assessment of whether a product is a cosmetic product has to be made on the basis of an individual assessment of the product, including all of its features.

Article 2 paragraph 2 of Regulation 1223/2009 clearly indicates that a cosmetic product may not be suitable for application other than externally. This section of the Regulation establishes that a cosmetic product is not ingested, inhaled, injected or implanted into the human body. Such a definition of the area and the form of application of a cosmetic product has far-reaching effects. Particularly, often the purpose and the method of application of the products widely used in various types of cosmetic services are inconsistent with the law. This is crucial for those using a particular product in professional activity, and is further addressed later in this article.

Medicinal products, medical devices and biocidal products, which fall outside of the scope of the Regulation on cosmetic products, are defined in separate laws. According to art. 2 section 32 of the Act of 6 September 2001 – Pharmaceutical Law, "a medicinal product is a substance or mixture of substances presented as having properties for treating or preventing disease in human beings or animals or given in order to make a diagnosis or to restore, correct or modify physiological body functions by exerting a pharmacological, immunological or metabolic action". The Act indicates the types of medicinal products, including homeopathic medicinal products (art. 2 section 29), and herbal medicinal products (art. 2 section 33a). A medicinal product defined in such a form remains in compliance with art. 2 paragraph 2 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, according to which the provisions of the Directive apply when, while taking into account all the characteristics of a medicinal product, the product may fall within the definition of a medicinal product and within the definition of a product covered by other Community legislation. The Directive also defines the purpose of the application of the product, describing it – as does art. 2 point 32 of the Pharmaceutical Law – very broadly. What is of particular importance is that the statutory definition emphasises the pharmacological effect of the medicinal product, the occurrence of which determines the proper classification of a product as a cosmetic product and not a drug. This problem is significant given that, in a situation where the product meets both the criteria for a medicinal product and the criteria for another product, e.g. a cosmetic, according

to art. 3q of the Act on cosmetic products in connection with art. 2 paragraph 2 of the Directive 2001/83, such a product is subject to the regulations on medicinal products. According to art. 1 paragraph 2 of Directive 2001/83/EC, a medicinal product is: a) any substance or combination of substances presented for treating or preventing disease in human beings, b) any substance or combination of substances which may be administered to human beings with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings.

The second of the exemptions set out in Regulation 1223/2009 applies to medical devices, to which the provisions of the Act of 20 May 2010 on medical devices apply. According to art. 2 paragraph 1 point 33, a medical device is "any instrument, apparatus, appliance, software, material or other item, whether used alone or in combination with the software intended by its manufacturer to be used specifically for diagnostic or therapeutic purposes and necessary for its proper application, intended by the manufacturer for use in humans in the statutory purpose". This Act is in compliance with Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ L 169, 12/07/1993). In its judgment of 22 November 2012, the Court of Justice of the European Union, when addressing the question referred for a preliminary ruling about the interpretation of the term "medical device", stressed that on account of the context of art. 1 paragraph 2 point a) of Council Directive 93/42 concerning medical devices and due to the goals indicated therein, the term "medical device" covers an object created by a manufacturer for use in humans in order to study the physiological process, only if it is intended for medical purposes (CJEU judgment of 22 November 2012).

The third exception applies to biocidal products referred to in the Regulation to the Act of 9 October 2015 on biocidal products. The Act does not contain a definition of biocidal products. Hence one refers to the Regulation to determine the categories and groups of biocidal products. One of the groups consists of biocidal products for personal hygiene, which include: products used for human hygiene purposes, applied on the human skin or scalp, or in contact with the skin, for the primary purpose of disinfecting the skin or scalp.

The above premises for classifying a product as a cosmetic product and the occurring difficulties in finding its proper form in the light of the confluence of the qualifying criteria mean that in certain situations determining a reasonable basis for the liability of service providers requires judicial intervention.

4. Protecting the Consumer – the Purchaser of Cosmetic Products

Cosmetic products are most often bought by consumers, though they are also used by people who provide cosmetic services. Thus, the Regulation on cosmetic products uses a broader definition than that of consumer – namely, the end user, which may be understood, according to art. 2 paragraph 1 point f, both as the consumer and as a person who uses a cosmetic product to pursue professional activity. The Regulation emphasises the aspect of the application and use of a cosmetic product, yet when referring to the consumer, it does not define the latter. This means that the concept of the consumer used in the Regulation requires a reference to the general legislation. The Regulation includes both the provisions of the Civil Code, i.e. the Act of 20 May 2014 on consumer rights and the Directive of the European Parliament and of the Council of 25 October 2011, 2011/83/EU on consumer rights.

According to art. 22^1 of the Civil Code, "a consumer is any natural person undertaking with a trader a legal action not directly related to its business or professional activity". The doctrine emphasises that the location and content of this provision indicate that the intention of the legislature was that art. 221 of the Civil Code provides the general definition of the consumer, which is binding for the entire legal system (Pazdan 2011, pp. 114–115). A narrow definition of the consumer, as included in the Civil Code, remains in compliance with the dominant European trend of limiting the scope of the application of this concept to the individual and to the activities in no way related to its economic or professional activity, although it is also possible to encounter a different position in the doctrine (Malarewicz 2009, p. 112). A similar approach of applying such a narrow definition of the consumer can be found in the Directive of the European Parliament and of the Council of 25 October 2011, 2011/83/EU on consumer rights. According to art. 2 paragraph 1 of the Directive, "*consumer* means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession". At the same time, as underlined in recital 17 of the Directive's preamble, the definition of the consumer provided for by this Directive, shall be also applied "in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract". The Consumer Protection Act, which constituted the implementation of Directive 2011/83/EU, adopted the same narrow approach to the concept of the consumer.

In conclusion, according to Regulation 1223/2009 and of the Act on cosmetic products, a consumer is a natural person who acquires and independently applies cosmetic products. In addition, because the Regulation has been extended to

cover the end user, the protection it affords will also be granted to the person who pursues the profession of cosmetic technician or cosmetologist who, when purchasing cosmetic products, applies them in the performance of cosmetic services. It is my view that the unambiguous limitation of the status of a consumer to legal transactions undertaken in order to carry out one's own activities, remaining beyond any economic or professional activity, is a narrow approach to the concept of a consumer, similarly to the definition set forth in art. 22^1 of the Civil Code.

Despite the rather broad approach to the concept of the consumer Directive 2011/83/EU takes, clearly differentiating between the consumer and the person using the cosmetic product in the course of their professional activities, as provided in Regulation 1223/2009, makes it impossible to grant the status of consumer to other end users than pure consumers. However, on account of the contractual relation between both entities, namely the contract to provide cosmetic services, their status as the contracting parties does not seem to raise major doubts. The literature emphasises that the legal classification of civil law relations between the consumer and the trader is determined by the definition of the consumer and the entrepreneur provided by the Civil Code. A different approach is presented by M. Borkowski, who maintains "the consumer is also the beautician who purchases cosmetic products which he or she will use for the cosmetic treatments applied to customers" (Borkowski 2015, p. 64).

Regardless of whether the purchaser of a cosmetic product is a consumer or a person who purchases the product for use in their professional activities, the Regulation protects the purchase and application of a cosmetic product. This protection is extended to ensure users' health and safety and is realised on several levels. According to art. 3 of Regulation 1223/2009, in order to minimise potential health risks, the safety of a cosmetic product is affected by suitable product presentation, labelling and accompanying information in the form of instructions for use and disposal, and other instructions necessary for the safe use of the product. In the same context, the safety of a cosmetic product is determined by art. 4 paragraph 1 of the Act on cosmetic products, which emphasises that the safety of cosmetic products also depends on their being applied correctly, i.e. their application is compatible with their intended use and in reasonably foreseeable conditions.

Apart from the detailed procedures related to the implementation of a cosmetic product, the Regulation indicates the substances whose application in cosmetic products is prohibited or restricted and subject to a detailed assessment – for example, nanomaterials used in cosmetic products. Of particular importance for consumer safety is packaging information with respect to the product's composition, weight, shelf life, usage, specific place of application, the person

responsible, as well as the product's documentation (art. 19 paragraph 1 of Regulation 1223/2009 in conjunction with art. 6 of the Act on cosmetics). All of the information pointed out in both these acts of law, placed on the packaging, must be indelible, easily legible and visible. In exceptional circumstances, where for practical reasons it is not possible to put the information directly on the packaging of the cosmetic products, the information is appended to an attached leaflet, label, tape, tag or card. Some products may even provide information in a condensed version. The liability for the safety of a cosmetic product burdens the responsible person, namely the manufacturer, importer or distributor, whose responsibilities are defined in articles 5–7 of the Regulation.

Due to the functions of cosmetic products – providing care, aesthetics and safety – their role is particularly important not only in the cosmetic services industry but also in medical treatment and rehabilitation (Wąsik 2016, pp. 11 and 22). Hence, it is of utmost importance, as indicated in point 2.1s, to distinguish between cosmetic products, medicinal products and medical devices. The considerations relating to the basis of the differentiation and classification of a product as a cosmetic or a medicinal product are reflected in situations where the user of the product is a provider of cosmetic services operating within the framework of its economic activity. Cosmetic services are most commonly provided by cosmetic services technicians or cosmetologists. Both professional groups can apply cosmetic products when providing their services, but they are not authorised to use medicinal products (including OTC medicinal products and herbal medicinal products) or medical devices. These professions do not perform the role of medical professionals, who are qualified to apply medicinal or other products, which must be considered as such, because in addition to meeting the criteria of cosmetic products, they also fulfill the requirements of medicinal products.

The same applies to medical devices, in which both cosmetic and medicinal products can be used. Even if a cosmetologist has been professionally trained to use a specific medical device, which in practice often occurs, he does not have the legal right to use them. Although the Act on medical devices does not directly indicate the entities authorised to use medical devices, their use is defined in the instructions, which may preclude some types of individuals from using them. The problem is not in fact the preparation and the service or the use of a medical device, but the lack of competence to assess the health of the patient to use the medical device. The literature indicates, in particular, the risks associated with the use of implants (especially tissue implants, which restore the permanent or temporary volume of tissue) and acidic substances (including hyaluronic acid), which are classified in accordance with the Regulation of the Minister of Health of 5 November 2010 on the classification of medical devices as being of a class III risk. This class includes invasive medical devices, including, for example, invasive

surgical devices intended for transient and short-term use, e.g., tissue implants, which in practice are also used in cosmetic services.

A detailed distinction and proper classification of the product and service as a cosmetic or medicinal product or services has further consequences in the scope of protection as set out in Regulation 1223/2009 and in the Act on cosmetics. In the case of the consumer, the purchaser of a cosmetic product or cosmetic service, this protection is additionally strengthened on the basis of the Consumer Rights Act. When a medicinal product or medical device is purchased, the protection is provided on the basis of the provisions provided for in all three of the above regulations. With health services, in most cases, the entity entitled to protection is not the consumer but the patient whose special status and the rules for his protection are governed by the medical acts law. While the Consumer Rights Act, referred to in art. 3 paragraph 1 point 7 of the Act, cannot be applied to health services, the status of the patient as a consumer and the protection related therewith is not excluded, depending on the type of health services called for and the entity providing them (Michałowska 2015, p. 210).

The distinction between the two types of products – cosmetics and medicines – and an appropriate qualification of the services rendered with their application is also fiscally reflected on the basis of tax on goods and services. A tax on goods and services does not apply to medical services rendered. According to the Act of 11 March 2004 on tax on goods and services, medical care services provided by a doctor and dentist, nurse and midwife, psychologist and persons practicing medicine are exempt from a goods and services tax. The provisions of the VAT Act indicate that the tax exemption shall not apply to medical services which are not intended to protect health. These include services for preventing, preserving, restoring and improving health. Accordingly, the condition of tax exemption is the occurrence of the therapeutic purpose indicated in the Act, for example, rehabilitation.

This approach raises a number of questions, because making the possibility of using the exemption conditional upon the objective rather than the character of the activity significantly broadens the conceptual scope of the therapeutic purpose of medical services, and that scope is not always consistent with the assessment of the tax authorities. In the case of cosmetic services, the taxpayer is charged the 23% VAT rate. In order to avoid taxation, taxpayers qualify the cosmetic service as a medical service, which unfortunately is not always intended for medical therapy. Rehabilitation is an example of such a service, though it may not fall within the professional status granted to the entities which claim to carry it out. That is to say, these entities may lack the appropriate authorisation to claim a tax exemption. A noteworthy example would be providers of cosmetic services in the form of SPA salons qualifying massage as rehabilitation, promoting a good mood and improved

body aesthetics – and thus exempting them from paying VAT. Often the purpose of the massage and the person performing it do not satisfy the conditions for the tax exemption. A similar qualification applies to physiotherapy services. Finally, with regard to the taxation on products, the VAT rate for cosmetic products is 23%, while for medicinal products found in the Register of Medicinal Products it is, at 8%, roughly a third of that.

5. Conclusions

Protecting consumers, the buyers of cosmetic products, is an interesting and complicated issue. Cosmetic products are covered by Regulation 1223/2009 and the Act on cosmetics, which attach primary importance to defining a cosmetic product and determining the border between cosmetic products and other products. That border is crucial for how a product is classified and distributed and the protection its users are extended. Due to the relatively flexible boundaries between a cosmetic product and other products, which are sometimes attributed the status of cosmetics, it is extremely important to demarcate the border between them and to identify their distinctive elements. It should be emphasised that medicines and cosmetics are two different products.

The need to correctly classify products has to do with ensuring safety and protecting the purchaser and user of the product, as specified in the legal provisions. Entities that apply cosmetic products, the end users/consumers and the people who use cosmetic products for their professional activities are covered by the protection provided in Regulation 1223/2009 and the Act on cosmetics. However, end users specified in the Regulation are entitled to another protected status. Similarly, another scope of protection applies to consumers who are also patients, or when, because a medical service is being provided, consumers are categorized as patients. The distinction between a consumer and other types of entities is also reflected in VAT tax liability. Accordingly, when a given type of service is qualified in a manner incompatible with the facts, additional tax consequences may apply.

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Ochrona konsumenta nabywcy i użytkownika produktu kosmetycznego w świetle Rozporządzenia Parlamentu Europejskiego i Rady (WE) nr 1223/2009 dotyczącego produktów kosmetycznych

(Streszczenie)

W artykule zwrócono uwagę na zagadnienia prawnej kwalifikacji produktu kosmetycznego oraz ochrony konsumenta – nabywcy produktu kosmetycznego. Zapewniona międzynarodowym i krajowym porządkiem prawnym ochrona gwarantowana jest dwoma równorzędnie obowiązującymi podstawami prawnymi, tj. Rozporządzeniem Parlamentu Europejskiego i Rady (WE) z dnia 30 listopada 2009 r. nr 1223/2009 dotyczącym produktów kosmetycznych oraz Ustawą z dnia 30 marca 2001 r. o produktach kosmetycznych. Z uwagi na praktyczne trudności kwalifikacji produktu jako kosmetyku podjęto wątek ustalenia relacji produktu kosmetycznego, produktu leczniczego i wyrobu medycznego. Odniesiono się również do zagadnienia kwalifikacji osób świadczących usługi kosmetyczne, wykorzystujących w nich produkty kosmetyczne, oraz do zakresu ich odpowiedzialności.

Słowa kluczowe: produkt kosmetyczny, produkt leczniczy, konsument, użytkownik końcowy.

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Contracts Concerning Rights in Immovable Property in the Light of Directive 2011/83/EU, and the Consumer Rights Act Implementing It

Abstract

The Consumer Rights Act of 30 May 2014 implements to the Polish legal system the Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights. It should therefore provide a comprehensive regulation on the contracts whose parties are the trader and the consumer. For the correct determination of the legal situation of the traders concluding contracts with the consumers, it is therefore important to specify a catalogue of contracts to which the provisions of the Consumer Rights Act apply. This catalogue (the subjective scope of the Act) came in for criticism by the legislature, which enumerated the contracts to which the provisions of the Act do not apply. This article focuses not so much on an overall analysis of the types of contracts excluded from the application of the Consumer Rights Act, but rather attempts to diagnose whether, and to what extent, contracts regulating the rights in immovable property have been excluded from the Act. In addition, it asks whether the regulations that shape these exclusions in the Consumer Rights Act in fact reflect the intention of the European legislature expressed in the Directive. To verify the aims of the study, the regulations of the Act that form the exclusions of the contracts concerning rights in immovable property are presented. As shown by the undertaken analysis, the content of the regulations affecting the exclusions regarding the contracts for the rights in immovable property can

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be interpreted inconsistently, which results in doubts as to what kind of contracts the Act applies to in full, and which contracts have been excluded from its regime and to what extent. The analyses presented in the study also show that the regulations contained in the Consumer Rights Act do not contain a proper reflection of the intentions of the European legislature. In respect to the exclusions of the application of the Consumer Rights Act to the contracts for the rights in immovable property, the Consumer Rights Act differs from the Directive.

Keywords: civil law, contracts, immovable property, law application, implementation of the Directive.
JEL Classification: K15.

1. Introduction

The Consumer Rights Act dated 30 May 2014[1] implements to the Polish legal system the Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights[2] (hereinafter: the Directive). This Directive is in principle an act introducing full harmonisation, and its primary goal was to harmonise the provisions on consumer contracts across the entire European Union. This is reflected in the content of art. 4 of the Directive, according to which "Member States may not within the scope regulated by the Directive maintain or introduce in their national laws provisions diverging from those laid down in the Directive, unless the Directive provides otherwise"[3].

The Consumer Rights Act, implementing the Directive, shall, therefore, constitute an important regulation on contracts in which the parties are the trader and the consumer. It defines the rights of the consumer, and, in particular,

[1] Act of 30 May 2014, Journal of Laws of 2014, item 827 (hereinafter: The Consumer Rights Act). The Consumer Rights Act also implements Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 on the distance marketing of consumer financial services (Official Journal of the EU, series L 144 of 1997, p. 19), and it also adds the regulation of the consumer sales contract to the Civil Code as well as modifies some other regulations relating to the performance of obligations.

[2] Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and the European Parliament and the Council Directive 1999/44/EC (Official Journal of the EU, series L 304 of 2011, p. 64). The Directive 2011/83/EU repealed the Directive 85/577/EEC of 20 December 1985 on the protection of consumers in respect of contracts negotiated away from business premises (Official Journal of the EU, series L 372, of 31 December 1985, p. 31) and the Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (Official Journal of the EU, series L 144 of 4 June 1997, p. 19).

[3] The model of maximum harmonisation was introduced also in recital 13 of the Directive 202/65/EC, which – next to the Directive 2011/83/EU – was implemented in the Consumer Rights Act (Maciejewska-Szałas 2015, p. 36).

regulates, among others, the obligations of the trader concluding a contract with the consumer[4]. Given that the Directive implemented in the Act of law introduces full harmonisation, the provisions of the Civil Code on contracts and the obligations applicable in relation to specific contracts will be interpreted in accordance with the Directive (Bagińska 2015, p. 7). At the same time, the provisions contained in such contracts, less favourable to the consumer than the provisions of the Consumer Rights Act, are invalid, and in their place shall be applied the provisions of the Act. It is also important that the consumer cannot waive the rights provided for in the Consumer Rights Act (art. 7 of Consumer Rights Act)[5].

Given the above, it is important to define the subjective scope of the Consumer Rights Act. This scope has been determined by the legislature in a negative way, by enumerating the contracts in relation to which provisions of the Act will not apply. The analysis of the catalogue of exclusions thus becomes necessary for the proper presentation of the subjective scope of the Consumer Rights Act. The subject matter of this article will be not so much an overall analysis of the types of contracts that have been excluded from the application of the Consumer Rights Act, but rather an attempt to diagnose whether, and to what extent, the regime of the Act does not apply, in additional to contracts relating to rights in immovable property. In addition, it appears advisable to also pay attention to whether the regulations that shape these exemptions in the Consumer Rights Act reflect the intention of the European legislature expressed in the Directive.

2. The Catalogue of the Contracts Excluded from the Regime of the Consumer Rights Act

The catalogue of the contracts which have been excluded from the regime of the Consumer Rights Act was included in the content of art. 3 and art. 4 of the Consumer Rights Act[6]. The scope of art. 3 of the Consumer Rights Act includes

[4] According to the Directive, the Consumer Rights Act was based on the principle of properly informing the consumer about the content of the future contract and its consequences. The information obligations contained in the Act relate to all contracts, not only those concluded by the trader with the consumer away from buss premises or at a distance.

[5] The Directive is mandatory in nature, and its aim to protect the interest of the weaker contracting party in the process of restricting freedom of contracts (Mokrysz-Olszyńska 2013, p. 85).

[6] As indicated in the doctrine, the legislature decided to divide the exceptions to the application of the Consumer Rights Act into two separate provisions because they came from different sources. The exclusions referred to in art. 3 of the Consumer Rights Act were previously contained in the Act on consumer rights protection and liability for damage caused by a dangerous

contracts over which the Act is not binding, while art. 4 of the Consumer Rights Act contains a catalogue of contracts which are partially excluded[7].

Under art. 3 paragraph 1 of the Consumer Rights Act, the provisions of the Act do not apply to contracts:

1) relating to social services, social housing, childcare, support for families and persons permanently or temporarily in need, including long-term care[8];

2) relating to gambling[9];

3) concluded with a trader undertaking frequent and regular tours during which a trader supplies foodstuffs, beverages and other articles intended for current consumption in the household, to the place of residence, stay or employment of the consumer;

4) relating to the carriage of persons, with the exception of art. 10 and art. 17;

5) concluded by means of automatic vending machines or automated points of sale;

6) concluded with the service provider referred to in art. 2 paragraph 27 point a of the Telecommunications Act, with a public machine in order to use such a machine or concluded in order to perform a single connection by telephone, Internet or fax by the consumer[10];

7) relating to health services provided by healthcare professionals to patients in order to assess, maintain or improve their health, including prescriptions, issuance and provision of medicinal products and medical devices, regardless of whether or not they are provided via healthcare facilities;

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product; in turn, the exemptions contained in art. 4 were provided for in the Act on special conditions of consumer sales and on the amendment to the Civil Code (Koralewski 2014, p. 11). It seems, however, that the intention of the legislature was associated with distinguishing the contracts to which the provisions of the Act are in part applicable from contracts which were entirely excluded from the regime of the Act.

[7] With respect to the contracts referred to in art. 4 paragraph 1 of Consumer Rights Act this exclusion is conditional. According to this provision, the contracts referred to therein shall be governed by the provisions of Chapter 2 of the Consumer Rights Act unless separate regulations provide otherwise. Such a solution, different from the total exclusion from the regime of the Directive of the contracts relating to rights in immovable property, as adopted in the Directive, results from the application by the Polish legislature of the prerogative provided for in recital 13 of the Directive. According to recital 13, the Member States have retained their competence to regulate in the national laws contracts not covered by the scope of the Directive.

[8] This exclusion applies to all services covered by the provisions of the Act on social welfare of 12 March 2004, i.e. Journal of Laws of 2015, item 163 with amendments.

[9] As described in the Act of 19 November 2009 on gambling, i.e. Journal of Laws of 2015, item 612 with amendments.

[10] Act of 16 July 2004 Telecommunications Law, Journal of Laws of 2014, item 243 as amended.

8) concluded in relation to a tour, as referred to in the Act on tourist services[11];
9) referred to in art. 1 paragraph 1 of the Timeshare Act[12];
10) off-premises contracts, if the consumer is required to pay an amount not exceeding fifty zloty.

The group of contracts completely excluded from the regime of the Act include also sales contracts made in enforcement proceedings and bankruptcy proceedings in connection with the liquidation of the bankrupt estate (art. 3, paragraph 2 of Consumer Rights Act).

In turn, art. 4 of Consumer Rights Act includes the contracts which have been in principle excluded from the application of the Act in part. According to art. 4 paragraph 1 of Consumer Rights Act, the Act does not apply to contracts relating to the creation, acquisition and transfer of the ownership of immovable property or other rights in immovable property as well as to contracts for rental of accommodation for residential purposes, with the exception of the provisions of Chapter 2, which are applied if separate regulations do not provide otherwise. On the other hand, according to art. 4 paragraph 2 of Consumer Rights Act, the Act shall not apply to contracts relating to financial services, except for contracts for financial services concluded at a distance, to which the provisions of Chapters 1 and 5 apply[13].

3. The Subjective Scope of art. 4 Paragraph 1 of Consumer Rights Act

3.1. General Remarks

As follows from the analysis of the content of art. 3 and 4 of Consumer Rights Act, one of the types of contracts excluded from the regulation under the Act are agreements concerning rights in immovable property. These exemptions are substantially included in art. 4 paragraph 1 of Consumer Rights Act, but they

[11] Act of 29 August 1997, Journal of Laws of 2014, item 196.

[12] Act of 16 September 2011, Journal of Laws No 230, item 1370.

[13] In particular: banking operations, consumer credit agreements, insurance operations, contract of acquisition or redemption of the units of open investment fund participation or of specialised open investment fund participation and the purchase or acquisition of investment certificates of open investment funds and the purchase or acquisition of investment certificates of closed investment funds, payment services.

are also regulated by art. 3 paragraph 1 point 9 of Consumer Rights Act, which mentioned the contracts referred to in art. 1 paragraph 1 of the Act on Timeshare[14].

The exemptions included in art. 3 and 4 of Consumer Rights Act formulate exceptions to the application of the Act, which must be interpreted strictly[15] and, therefore, the content of the regulations that shape these exceptions must be precise. It should, in fact, unambiguously lay down how to determine the type of contracts to which the provisions of the Act will not apply or will apply to a limited extent. In such a context, it is worth analysing the content of the regulations affecting the exemptions from the regime of the Act, in relation to the contracts regulating rights in immovable property. This analysis should also take into account to what extent the exceptions listed in the Consumer Rights Act reflect the intention of the European legislature expressed in the Directive.

3.2. The Problem of the Interpretation of the Content of art. 4 Paragraph 1 of Consumer Rights Act

In accordance with art. 4 paragraph 1 of the Consumer Rights Act, the Act does not apply to contracts relating to the creation, acquisition and transfer of the ownership of immovable property or other rights in immovable property as well as to contracts for the rental of accommodation for residential purposes, with the exception of the provisions of Chapter 2, which are applied if separate regulations do not provide otherwise. The analysis of the contents of this provision implicates that it can be interpreted differently.

Firstly, one could argue that the legislature indicates that it refers to the exclusion of contracts connected with the establishment, acquisition or transfer of all property rights of immovable property of nature of rights in rem. In turn, with regard to obligation rights (rights in personam), the exclusion applies only to contracts for the rental of accommodation for residential purposes. Accordingly, the exemptions from the regime of the Act will apply to contracts for the creation, acquisition or transfer of the ownership of real property, perpetual usufruct and limited rights in rem. Bearing this interpretation in mind, doubt arises as to whether the provision applies only to contracts of disposing character or also

[14] To some extent such contracts are also covered by the inclusions contained in art. 3 paragraph 1 point 1 of the Consumer Rights Act, which refers to social services as well as in art. 3 paragraph 1 point 8 of the Consumer Rights Act, which refers to the exemption of tourist services.

[15] In this way, under the EU regulations which are the subject of implementation, for example the judgment in case C-215/08 (E. Friz GmbH), point 32: "In this regard, it should first be noted that, according to the settled case law, the exceptions to the norms of the European Union law aimed at protecting consumers must be interpreted strictly (see in particular, judgment of 13 December 2001 in the case C-481/99 Heininger, Rec. s. I-9945, point 31)".

to contracts that oblige to dispose of real estate[16]. In respect to obligation rights (rights in personam), the exemption will apply only to the right of the rental of accommodation for residential purposes. Therefore, contracts for the rental of accommodation for non-residential purposes, contracts of the lease of lands or buildings will remain outside the scope of the exclusion. The exclusions will neither apply to other obligation contracts, even if they are relating to residential accommodation, such as lending or leasing for the purpose of harvesting fruit.

Secondly, it can be argued that the content of said provision should be interpreted in a different way, namely that the regulations of the Consumer Rights Act do not apply (with the exception of the regulations contained in Chapter 2 of the Consumer Rights Act) to any contracts having as their object the rights in immovable property (both right in rem as well as right in personam), provided, however, that in terms of the leases, the issue in fact concerns only the exclusion of the contracts for the rental of accommodation for residential purposes. In terms of the application of the Act, there would remain (in reference to the lease contracts), only the lease of accommodation for purposes other than residential ones.

A literal interpretation of the provision leads to the conclusion that the first position should be treated as the correct one. Accordingly, the legislature exempts from the regime of the Consumer Rights Act the contracts of character rights in rem and from the scope of obliging contracts (rights in personam) the legislature excludes only the contract for the lease of the accommodation for residential purposes. This understanding of the content of art. 4 paragraph 1 of the Consumer Rights Act would be supported by the application, both in the content of art. 3f of the Directive as well as in the content of art. 4 paragraph 1 of the Consumer Rights Act, of the word "and", representing the equivalent of the phrase "as well as".

3.3. The Wording of Art. 4 Paragraph 1 of the Consumer Rights Act in Light of the Intention of the European Legislature

The adoption of such an interpretation of art. 4 paragraph 1 of the Consumer Rights Act leads to another question: whether the wording of art. 4 paragraph 1 of the Consumer Rights Act is a correct reflection of the assumptions of the European legislature. This issue should be analysed by examining both the appropriate exclusions specified in the Directive, as well as the intentions of the European legislature, expressed in paragraph 26 of the recitals of the Directive.

In respect of the provisions of the Directive, it is justified to draw attention to art. 3 paragraph 3 of the Directive, which contains a catalogue of contracts

[16] The view according to which this provision applies both to the contracts of a disposing character and to obliging contracts has been expressed by W. J. Kocot and J. M. Kondek (2014, p. 9). The concerns in this regard are raised by B. Lanckoroński (2014, p. 247).

to which it does not apply, and in particular to points e, f and i of this provision. According to these regulations, the following contracts have been excluded from the regime of the Directive:

1) contracts relating to the creation, acquisition and transfer of the ownership of immovable property or rights in immovable property (art. 3 paragraph 3 point e of the Directive);

2) contracts for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes (art. 3 paragraph 3 point f of the Directive);

3) contracts drawn in accordance with the laws of the Member States, by the state official, having a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer concluded the contract only after careful legal consideration and with knowledge of its legal scope (art. 3 paragraph 3 point i of the Directive).

At the same time, attention should be drawn to the intentions of the European legislature expressed in recital 26 of the Directive, according to which "Contracts relating to the transfer of immovable property or of rights in immovable property or to the creation or acquisition of the ownership of immovable property or rights in it, contracts for the construction of new buildings or the substantial conversion of existing buildings as well as contracts for the rental of accommodation for residential purposes are already subject to a number of specific requirements in national legislation. Those contracts include, for instance, sales of immovable property still to be developed and hire-purchased. The provisions of this Directive are not appropriate to those contracts, which should be, therefore, excluded from its scope of application (…)"[17].

It follows from the above that the aim of the European legislature was to create a catalogue of exclusions involving contracts, which were previously regulated by provisions that contain detailed rules on consumer protection, as well as the rights and obligations of the trader and the consumer being the parties to such contracts. Therefore, due to the existence of such a separate system of consumer protection, excluding certain contracts from the application of the Directive, and thus from the Consumer Rights Act that implements it, would be justified. As indicated in the doctrine, it would be difficult to accept such an interpretation of the provisions

[17] In a subsequent part of recital 26, the European legislature indicated that a substantial conversion is a conversion comparable to the construction of a new building, for example where only the façade of an old building is retained. Service contracts, in particular those related to the construction of annexes to buildings (for example a garage or a veranda) and those related to repair and renovation of buildings, other than substantial conversion, should be included in the scope of this Directive, as well as contracts related to the services of real estate agents and those related to the rental of accommodation for non-residential purposes.

of the Consumer Rights Act which would cover the legal relations already regulated in detail in another act (Ciepła & Szczytowska 2014). In this context, the above should be connected to the legislation in force in the Polish legal system. In particular, attention should be paid to the content of the Act on the protection of the rights of the purchaser of a dwelling or a detached house[18] (hereinafter: Development Act) and the Act on the protection of the rights of tenants, housing resources of municipalities and amending the Civil Code[19] (hereinafter: the Act on the protection of the rights of tenants). It is also reasonable to take into account the following regulations: the Civil Code in relation to the participation of public officials at the conclusion of the contract[20], the Act on ownership of accommodation[21] or the Act on housing cooperatives[22].

3.4. Contracts Relating to Rights in Rem in Immovable Property

The doctrine indicates that contracts on the creation, acquisition or transfer of the ownership to real property or rights in immovable property have been excluded from the application of the Consumer Rights Act, due to the Development Act in force in Polish law as well as on account of regulations in the Civil Code that introduce the obligation to establish the rights in rem in the form of a notarial deed (Koralewski 2014, p. 11).

It should be noted at this point, nevertheless, that the Polish legislature has not decided to introduce exclusions of an unconditional nature, relating to the contracts concluded with the participation of a public official responsible for acting with impartiality and independence (art. 3 paragraph 3 point i of the Directive). As follows from the European Commission's guidelines on the Directive, this provision should be implemented by Member States in such a way that would ensure that the transposed national legislation is not applicable to all types of contracts drawn up by such entities as notaries. In this scope, the Polish implementation of the Directive is incomplete and entails specific effects. Basically, the creation or acquisition of rights in rem to immovable property,

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[18] Act of 16 September 2011, Journal of Laws of 2011, No 232, item 1377.

[19] Act of 21 June 2001, i.e. of 2016, item 8.

[20] Act of 23 April 1964, i.e. Journal of Laws of 2014, item 121 as amended. In particular, the provisions of art. 155, art. 158, art. 232, art. 244 on the transfer of real estate ownership, governing the contract of perpetual usufruct and transfer of this right, and the provisions relating to the creation of other limited property rights.

[21] Act of 24 June 1994, i.e. Journal of Laws of 2000, No 80, item 903 as amended. In particular, the provisions on the contract for the establishment of separate ownership of premises.

[22] Act of 15 December 2000, i.e. Journal of Laws of 2013, item 1222 as amended, regarding the cooperative ownership right to premises.

namely ownership, perpetual usufruct or limited property rights, should take place on the basis of a contract that requires a notarial deed form. However, due to the absence of the aforementioned exclusion, any contracts relating to rights in rem in immovable property, concluded in the form of a notarial deed, will not be excluded from the regime of the Act unconditionally but only partially. In fact, the provisions of Chapter 2 of the Consumer Rights Act will apply to such contracts, if the provisions governing a given type of contract do not set forth otherwise. Further, the introduction into the the Consumer Rights Act of the exclusion corresponding to the exclusion regulated in art. 3 paragraph 3 point i of the Directive would result in excluding not only contracts for the validity of which the provisions of law provide, for example, the form of a notarial deed, but also contracts that do not have such a legal requirement; however, they would be indeed concluded in the form of a notarial deed.

At the same time, art. 3 paragraph 3 point f of the Directive was also not reflected in the Consumer Rights Act, insofar as it did not generate the exclusion from the application of this Act to the contracts for the construction of new buildings or for the substantial conversion of existing buildings. The Polish legislature decided, therefore, that all contracts for construction or renovation works are subject to the regime of the Consumer Rights Act to the full extent. Note, however, that the intention of the European legislature was to exclude from the regime of the Act the contracts that were already regulated in the national system, and which contain the regulations that constitute the system of consumer rights protection. One such act is the Development Act. When analysing the content of this Act, and in particular art. 1 and art. 22 point 18, it may be noted that the *essentialia negotii* of the development contract include "a commitment of a developer to construct a building, separate residential premises and to transfer to the purchaser the ownership of the premises and the rights necessary to use the premises". The intentions of the European legislature are not reflected in this case.

The doctrine draws attention to the fact that the national legislature did not have reasonable grounds to separate the object of a development contract by excluding from the application of the Directive only the contracts that relate to the creation, acquisition and transfer of the ownership of immovable property or rights in immovable property without simultaneous exclusion of contracts for the construction of new buildings (Ciepła & Szczytowska 2014). However, as a consequence, the question of to what extent the Consumer Rights Act applies to development contracts was assessed inconsistently. Some contend that the act does not include development contracts or preliminary development contracts (reservation contracts), but rather applies to preliminary contracts of sale, which are signed for permissible investments. According to other views, a literal interpretation of art. 4 paragraph 1 of the Consumer Rights Act stipulates that the

provisions of Chapter 2 of the Consumer Rights Act will apply to the conclusion of a development contract (Leśniak 2015, p. 28). At the same time, however, it can be argued that if the subject of a development contract is, among others, the construction of buildings, where construction contracts are governed by the provisions of the Consumer Rights Act to their full extent, due to the inability of separating the object of a development contract, the provisions of the Consumer Rights Act will apply to such a contract in their entirety.

3.5. Contracts Relating to Rights in Personam in Immovable Property

As has been noted, the interpretation of art. 4 paragraph 1 of Consumer Rights Act indicates that with regard to contracts that form obligation rights (rights in personam) to immovable property, the application of the Act has been excluded only in the case of contracts for rental of accommodation for residential purposes. Lease agreements for harvesting fruit, lending or rental agreements other than the rental of accommodation for residential purposes will be covered by the scope of the Consumer Rights Act. The doctrine assumes that such an exclusion stems from the fact that in the system of national law there applies an act of law that regulates in detail the protection of the consumer at the conclusion of such a contract. In such a situation it is emphasised, therefore, that the legislature has excluded the lease contract for the accommodation for residential purposes from the scope of the Consumer Rights Act because the provisions of the Act on the protection of the rights of tenants include a special system for protecting the parties of the leasing contract and, therefore, any additional application of the Consumer Rights Act to such contracts would be redundant (Koralewski 2014, p. 11).

Nevertheless, certain doubts arise in the context of the above issues. Firstly, the Act on the protection of the rights of tenants regulates the principles and forms of the rights of tenants, whereas the term "tenant" is understood as the tenant or a person using the premises on another legal basis other than for ownership. The regulations of this Act are, therefore, also applicable in the situation of lending residential premises. Thus, if the legislature intended to exclude from the regime of the Consumer Rights Act only leasing contracts, then the contract of lending residential premises will be governed both by the provisions of the Act on the protection of the rights of tenants as well as by the regulations of the Consumer Rights Act[23]. At the same time, however, the regulations of the Directive, and consequently the national legislation transposing the latter, should not apply

[23] B. Lanckoroński (2014, p. 247) indicates that limiting obligation contracts only to the contract of lease of residential accommodation raises particular doubts in terms of the contract of lending residential accommodation.

to contracts of a gratuitous character[24], and therefore the contract of lending accommodation for residential purposes should also be excluded from the regime of the Consumer Rights Act. However, the Polish legislature opted for a different approach to contracts concluded at a distance and off-premises contracts than the one set forth in the EU's definition. In particular, it did not include the introduction of the condition of non-gratuitous character of contracts. This led to the scope of the application of the regulation of the Consumer Rights Act being extended to non-gratuitous contracts as well[25]. Accordingly, if the intention of the European legislature was to exclude the contract of lending the accommodation for residential purposes, which was realised with the help of a clear indication of the lease contract and the exclusion of non-gratuitous contracts, this has not been adequately reflected in the Consumer Rights Act.

Secondly, doubts concerning interpretation are generated by the use, on the part of the national legislature, in the content of art. 4 paragraph 1 of the Consumer Rights Act, of the term "lease of accommodation" and not lease of premises. If, when following the intention of the European legislature, the exclusion from the regime of the Consumer Rights Act was to apply to contracts already regulated in a specific manner in the national system, the national legislature should have adequately expressed it in the content of the regulation of the Consumer Rights Act. It should therefore be noted that the Act on the protection of the rights of tenants includes a definition of premises. Given this, doubt may arise as to whether the exclusion under art. 4 paragraph 1 of the Consumer Rights Act applies only to the contract of the lease of the accommodations defined in the Act on the protection of the rights of tenants as premises or whether it will apply to a broader catalogue of lease contracts. For example, according to art. 2 paragraph 1 point 4 of the Act on the protection of the rights of tenants, the concept of premises does not include accommodation used for short-term stays, in particular those located, for example, in dormitories or boarding houses. The doctrine indicates that contracts of lease of accommodation excluded in the Act on the protection of the rights of tenants from the concept of the premises do not fall, therefore, within the scope of the exclusion of art. 4 paragraph 1 of the Consumer Rights Act. In relation to such contracts, the Consumer Rights Act will be fully applicable (Lubasz 2015, p. 74). It seems, however, that the lack of wording in art. 4 paragraph

[24] The condition for the application of the Directive is the payment by the consumer of a price in exchange for the performance rendered by the trader, pursuant to art. 2 points 5 and 6 of the Directive.

[25] As indicated in the doctrine, the adopted solution is a violation of art. 4 of the Directive, according to which Member States may not maintain or introduce in their national laws provisions diverging from those laid down in the Directive, including more or less stringent provisions, to ensure a different level of consumer protection (Lubasz 2015, p. 62).

1 of the Consumer Rights Act: "the lease of premises for residential purposes", causes the exclusion contained in that provision to cover a wider spectrum of lease contracts than only premises as laid down in the Act on the protection of the rights of tenants. In addition, the formulation "the lease of accommodation for residential purposes" may raise the question of whether the scope of the exclusion does not cover single-family houses, or even residential buildings, as well.

The problem of excluding contracts relating to rights in personam from the regulations of the Consumer Rights Act does not apply, however, only to such contracts as lease contracts, lending contracts or lease contracts with the right to harvest fruit. It applies to all relations of an obligatory nature relating to immovable property. For example, this problem will concern a contract, often concluded between the trader (the developer) and the consumer, for the division of the property to be used (*quoad usum* contract). With regard to this contract, the essence of the problem will focus on heterogeneous views of its legal nature. Assuming that such a contract creates a relationship of an obligatory nature between the parties, which is an unnamed legal relationship with enhanced effectiveness[26], it must be deemed that it will be regulated by the provisions of the Consumer Rights Act[27]. However, if it is recognised that this is a contract relating to rights in rem (Drozd 2007, pp. 76–77), it would need to be assumed that the regulations of the Consumer Rights Act will be only partially applicable to it.

4. Contracts Relating to Rights in Immovable Property, Covered by the Timesharing Act

As has been indicated, the exclusions relating to the contracts for the rights in immovable property were regulated not only in the content of art. 4 paragraph 1 of the Consumer Rights Act. These contracts are also regulated by art. 3 paragraph 1 point 9 of the Consumer Rights Act, according to which the exclusion applies to contracts referred to in art. 1 paragraph 1 of the Act of 16 September 2011 on timesharing.

However, unlike in art. 4 paragraph 1 of the Consumer Rights Act, the exclusion contained in art. 3 paragraph 1 point 9 poses no doubts about its interpretation. It corresponds to the intention of the European legislature expressed in paragraphs

[26] In respect to the purchaser of the share, provided that he knew about such a contract or could have known about it.

[27] The legal nature of a *quoad usum* contract is disputed. Most of the doctrine recognises, however, that this contract creates an unnamed legal relation of obligation between the parties. See, for example (Kostański 2004, p. 34; Mielcarek 1965, pp. 1236 and 1239; Krajewski 1968, p. 38; Durzyńska 2011, p. 246). For more on this subject, see (Warciński 2011, pp. 37–38).

26 and 32 of the Directive recitals, as well as to the content of the regulation that provides for exclusions of its application. Accordingly, pursuant to art. 3 paragraph 1 point h of the Directive, it shall not apply to contracts that fall within the scope of the Directive of the European Parliament and Council 2008/122/EC of 14 January 2009 on the protection of consumers with respect to certain aspects of timeshare, long-term holiday product, resale and exchange contracts. Such exclusion is anchored in the content of paragraph 32 of the recitals of the Directive, according to which "the existing European Union legislation, concerning, inter alia, (…) timeshare contracts, contains numerous rules on consumer protection. Therefore, this Directive should not apply to contracts in those areas".

The wording of art. 3 paragraph 1 point 9 of the Consumer Rights Act thus fully corresponds to the idea of excluding from the scope of the Directive, and consequently from the domestic legal acts implementing it, contracts that have already been adequately regulated in the laws of the Member States. In the Polish legal system such an act is the Timesharing Act, which implements the Directive 2008/122/EC[28]. This Act of law contains detailed rules on consumer protection, the rights and obligations of the trader and the consumer as the parties to such contracts and the effects of the consumer withdrawing from such contracts. Thus, on account of the existence of a separate consumer protection system, the contracts referred to in art. 1 paragraph 1 of this Act were excluded from the regime of the Consumer Rights Act. This exclusion applies to:

1) timeshare contracts – namely contracts under which the consumer acquires, against consideration, the right to use, in the periods specified in the contract, at least one premises, when such a contract is concluded for a period longer than one year. Note here that a timeshare contract is a special type of contract for the use of residential buildings or parts thereof during a specified period of time. The object of such a contract may be movable or immovable property[29], where timesharing may take the form of the right of an obligation or property character – a specific type of use (art. 20 of Timesharing Act)[30];

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[28] Directive of the European Parliament and of the Council of 14 January 2009, Official Journal of the European Union, series L 33 of 3 February 2009.

[29] However, the Act introduces restrictions on the possibility of establishing movables as the subject matter of the contract. The subject of the contract may be only movable items on which it is possible to allocate accommodation (ships or car trailers).

[30] Timesharing is characterised by a number of peculiarities in relation to the typical contract of use regulated in the Civil Code. The text of art. 20 of Timesharing Act defines the Civil Code provisions whose application has been excluded from the timeshare contract. The rights under a timesharing contract, unlike those in a typical contract of use, are transferable and do not expire with the death of the authorised natural person or as a result of a failure to exercise them for at least 10 years.

2) contracts for long-term holiday stay. This is a contract under which the consumer acquires, against consideration, the right to receive discounts or other benefits relating to accommodation, when such a contract is concluded for a period of longer than one year[31];

3) agency agreements in timeshare resale or long-term holiday product. These are contracts under which the trader undertakes, against consideration, to perform legal or factual actions aiming at the acquisition or disposal by the consumer of the rights under timeshare or under the contract of a long-term holiday product;

4) contract on participation in an exchange system. Namely contracts under which the trader provides to the consumer, against consideration, the access to an exchange system. Under such a system the consumer acquires the right to use the accommodation or the right to acquire other services provided by the trader in exchange for allowing other consumers to use the accommodation which is the subject of his timeshare contract.

5. Conclusions

The scope of the Consumer Rights Act, implementing the Directive, has been deemed flawed by the legislature, insofar as it enumerates contracts to which the provisions of the Act will not apply. One type of contract covered by the catalogue of exclusions is the contract concerning rights in immovable property. Because all exceptions to the application of the act of law should be interpreted strictly, the content of the provisions regulating these exceptions must be precise. In this context, there has been presented an analysis of the wording of the articles, affecting the exemptions from the regime of the Consumer Rights Act, of contracts relating to rights in immovable property. This analysis was carried out not only to determine whether the content of the provisions in question clearly shows what specific contracts have been excluded from the regime of the Consumer Rights Act. It also was done to determine whether the rules that shape these exclusions in the Consumer Rights Act reflect the intention of the European legislature expressed in the Directive.

As the analysis showed, the content of the regulations affecting the exclusions regarding contracts for the rights in immovable property can be interpreted inconsistently, which causes doubts as to what types of contracts this Act of law fully applies to, and which contracts and to what extent they have been excluded from its regime. It is impossible to accede that these regulations contain the

[31] Such a contract may also provide for the consumer's right to purchase services related to travel, in particular the right to take advantage of the premises, the right to purchase transport services or to purchase other services (art. 3 of the Timeshare Act).

correct reflection of the intention of the European legislature. The Consumer Rights Act differs from the Directive in that it excludes from its application contracts concerning rights in immovable property. That exclusion results in the Act covering gratuitous contracts, such as contracts to lend residential premises. It also brings about the need to undertake a complicated analysis of whether and to what extent the contract regulated in detail in other legislation is also covered by the regulations of the Consumer Rights Act (e.g. a development contract)[32].

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[32] At this point one should therefore agree with the view that "the application of the Consumer Rights Act is a difficult task due to vague terms used in it, as well as on account of its relation to other acts of law and its imperfect implementation, requiring often the interpretation of this Act in the light of the Directive 2011/83/EU" (Lubasz 2015, p. 18).

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Warciński M. (2011), *Podział rzeczy quo ad usum*, "Państwo i Prawo", vol. 9.

Umowy dotyczące praw do nieruchomości w świetle dyrektywy 2011/83/UE oraz implementującej ją ustawy o prawach konsumenta

(Streszczenie)

Ustawa o prawach konsumentów z dniem 30.05.2014 r. implementuje do polskiego porządku prawnego dyrektywę Parlamentu Europejskiego i Rady 2011/83/UE z dnia 25.10.2011 r. w sprawie praw konsumentów. Katalog umów, do których mają zastosowanie przepisy ustawy o prawach konsumentów, został oznaczony przez ustawodawcę w sposób negatywny, poprzez wyliczenie umów, wobec których przepisy ustawy nie mają zastosowania. Przedmiotem artykułu uczyniono próbę zdiagnozowania, czy i w jakim zakresie spod reżimu ustawy wyłączone zostały umowy dotyczące praw do nieruchomości, jak też to, czy regulacje kształtujące te wyłączenia stanowią odzwierciedlenie intencji ustawodawcy europejskiego wyrażonych w dyrektywie. W celu zweryfikowania celu badania analizie poddane zostały przepisy ustawy, które tworzą wyłączenia umów dotyczących praw do nieruchomości. Jak wykazała przeprowadzona analiza, treść przepisów kształtujących wyłączenia w zakresie umów dotyczących praw do nieruchomości może być interpretowana niejednolicie, co powoduje, że powstają wątpliwości dotyczące tego, do jakiego rodzaju umów ustawa ma zastosowanie w całości, a które umowy i w jakim zakresie wyłączone są spod jej reżimu. Wykazano dodatkowo, że nie sposób przyjąć, iż regulacje te zawierają prawidłowe przełożenie intencji ustawodawcy europejskiego.

Słowa kluczowe: prawo cywilne, umowy, nieruchomość, stosowanie prawa, implementacja dyrektywy.

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Jan Lic

The Impact of EU Law on Consumer Protection in Real Estate Development Contracts (Pre-construction Contracts)

Abstract

The real estate development contract is partially regulated in the Act on the protection of the purchaser of dwelling premises or a detached house. This Act provides for three types of consumer protection measures: those related to the protection of the purchaser's interest at the moment of concluding the contract, those that secure his payments and those related to the stage of implementing the commitments of the developer. Moreover, the Act provides for civil penalties and criminal sanctions in respect of the developer's obligations. The impact of EU law on this Act is not unambiguous. On the one hand, EU legislation indicates and supports the overall objective of the regulation, namely the protection of the consumer. On the other hand, there is no corresponding directive on consumer protection in the real estate development contracts. Unfortunately, the European Union has not exercised the power granted to it under articles 4 and 169 of the Treaty on the Functioning of the European Union. It is only in the area of the liability for defects of the subject matter of a contract that one can perceive the direct impact of EU law, because in this respect Directive 1999/44/EC applies within the EU.

Keywords: real estate development contracts, the buyer of the premises, the information prospectus, escrow account, statutory warranty for defects, withdrawal from the contract, EU Directive.
JEL Classification: K12, K15.

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1. Introduction

There is no doubt that real estate development contracts are significant both from an economic and a social point of view. Both aspects are important for consumer protection. In economic terms, because a contract's value often equals the lifetime income of the purchaser, it represents a significant financial burden, and thus exposes the property owners to great risk in the event of a project's failure. In social terms, these contracts have a significant impact on consumers' quality of life. As it is consumers that make up a community, which implements legitimate aspirations and desires, By all means their legal situation in these contracts deserves protection.

Despite legitimate reasons for introducing special consumer protection in real estate development contracts, not much has been done in this respect during the two decades since the political transformation in Poland. At this time in Poland, numerous developers went bankrupt while there was also a good deal of fraud, the misappropriation of buyers' funds and larceny. Despite this, it was not until 2011 that the Polish authorities decided to take firm statutory steps, and then it was only because they were required to do so by the Constitutional Court, which alleged the existence of a legal loophole in the protection of the rights of buyers of apartments[1]. Such a late reaction of the legislature means that art. 76 of the Constitution was violated. That article specifically requires public authorities to protect consumers, users and tenants against activities threatening their health, privacy and safety, as well as against unfair market practices.

The purpose of this paper is to determine if and to what extent the EU law has impacted consumer protection in real estate development contracts. Consumer protection in such contracts calls for special legal regulations, as, due to their specific nature, general consumer protection is insufficient. The specific nature of such contracts is reflected in a number of aspects. First, consumers allocate substantial amounts of money for the developer's investment projects, which usually come from all their savings or from bank loans. Second, such funds nearly always must be entrusted to the developer well in advance of its service. In such a case, the consumer establishes complex relations with the developer and often also with a bank; however, they are the weaker party in such relations. Third, the investment process has multiple stages, which necessitates the establishment of a complicated system of contracts be concluded, most of which must be in the form of a notarial deed. Due to the complicated nature of real estate development contracts, the EU legal acts and their implementation in national law which apply to consumers in general terms only will not be examined here. Hence, the paper

[1] Constitutional Court ruling of 2 August 2010, S 3/10, OTK-B 2010, no 6, item 407.

will not discuss the text of such important legal acts for consumer law as Directive 2005/29/EC[2] and its implementation into the national law in the Act on combating unfair commercial practices[3]. Suffice it to say that the consumer in the real estate development contract is also the consumer in general terms, thus, within such a limited scope, they are protected by the entirety of pro-consumer legislation.

2. Protection of the Purchaser of Dwelling Premises and a Detached House in Genere

Initially the laws protecting the purchaser of premises were included in the Act on Ownership of Premises[4]. Unfortunately, the protection measures introduced in art. 9 of the Act proved woefully inadequate. After the release of the said ruling of the Constitutional Court in 2010, the Act on the protection of the purchaser of dwelling premises or a detached house[5] was enacted, coming into force on 28 April 2012. This Act contains pre-contractual, contractual and post-contractual consumer protection measures as well as sanctions in respect of the obligations imposed on the developer.

The pre-contractual protection measures of the consumer (the purchaser of dwelling premises or a detached house) include the requirement that a prospectus relating to the investment project or undertaking be prepared (art. 17 of the Act on the protection of the purchaser of dwelling premises or a detached house). Together with the annexes, this forms an integral part of the real estate development contract (art. 20 paragraph 2 of the Act on the protection of the purchaser of dwelling premises or a detached house).

The contractual consumer protection measure stipulates the conclusion of a real estate development contract that meets the statutory requirements[6]. Art. 22 paragraph

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[2] 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 ('Unfair Commercial Practices Directive') (OJ L 149, 11.06.2005, pp. 22–39).

[3] The Act of 20.08.2007 on combating unfair commercial practices (Journal of Laws No 176, item 1206, as amended).

[4] The Act of 24 June 1994 on the ownership of premises (Journal of Laws of 2000, No 80, item 903 as amended), hereinafter: Ownership of Premises Act.

[5] The Act of 16 September 2011 on the protection of the purchaser of dwelling premises or a detached house (Journal of Laws of 2011, No 232, item 1377 as amended), hereinafter: the Act on the protection of the purchaser of dwelling premises or a detached house.

[6] The Act of 23 April 1964 – the Civil Code (Journal of Laws of 1964, No 16, item 93 as amended), hereinafter: the Civil Code.

1 points 1–18 of the Act on the protection of the purchaser of dwelling premises or a detached house regulates in detail the content of this contract. The guarantee that the contractual interests of the consumer will be protected is a provision stating that if the terms and conditions of the real estate development contract are deemed less favourable for purchasers than the provisions of the Act, they are invalid, and in their place there shall apply the relevant provisions of the Act (art. 28 of the Act on the protection of the purchaser of dwelling premises or a detached house). An important contractual means of safeguarding the interests of the buyer is also the obligation to conclude the contract in notarial form (art. 26 paragraph 1 of the Act on the protection of the purchaser of dwelling premises or a detached house).

The post-contractual measure of safeguarding the interests of the buyer is the obligation to enter into the land and mortgage register the claim of the purchaser to have a building or a detached house constructed and to have the ownership rights to the property transferred to him, and in the case of residential premises, the buyer additionally has the right to have the premises separated (art. 23 of the Act on the protection of the purchaser of dwelling premises or a detached house). The entry into the land and mortgage register extends the validity of the claim in relation to any developer which acquires the property upon which the undertaken construction is implemented. The buyer may require the performance of the contract by the legal successor to the developer (art. 17 of the Act on land and mortgage register[7]).

The sanctions in respect of the responsibilities imposed on the developer include the purchaser's right to withdraw from the contract, as provided for in art. 29 of the Act on the protection of the purchaser of dwelling premises or a detached house. This right is vested in the buyer when the real estate development contract does not contain the elements of the contract detailed in art. 22 of the Act on the protection of the purchaser of dwelling premises or a detached house. Additionally, the purchaser may also withdraw from the contract for these four reasons: if the developer has not delivered the information prospectus; if the information prospectus does not contain all the information listed in the model prospectus; if there is an inconsistency between the information contained in the prospectus and the terms of the contract; or if the information is incompatible with the state of the facts or the law. At the same time, what the kind of incompatibility which exists and what information it applies to is irrelevant to the intention to withdraw from the contract (Burzak, Okoń & Pałka 2012, p. 303; Czech 2013, p. 420).

In addition to protecting the rights of the buyer in the contractual scope, the Act on the protection of the purchaser of dwelling premises or a detached house also provides extensive protection of the buyer's financial involvement in

[7] The Act of 6 July 1982 on land and mortgage register (i.e. Journal of Laws of 2001, No 124, item 1361 as amended).

the construction process. The protection of the payments made by the purchasers is provided for in art. 4 of the Act on the protection of the purchaser of dwelling premises or a detached house in the form of: a closed escrow account, an open residential escrow account and insurance guarantee, an open residential escrow account and a bank guarantee and an open residential escrow account. According to some of the academic researchers, the purchaser may not waive this protection measure in the real estate development contract (Czech 2013, p. 89; conversely Ciepła 2012, p. 65). In practice, there are no agreements which would contain guarantees and therefore the provisions introducing these institutions have become irrelevant and unnecessary (Burzak, Okoń & Pałka 2012, p. 106; Czech 2013, pp. 89–90). Of the two other forms of security of the deposit paid by the buyer, the most commonly is the open escrow account[8]. Separate provisions of the Act on the protection of the purchaser of dwelling premises or a detached house regulate the rules of maintaining this account by the developer.

The developer can dispose of the funds paid out from an open residential escrow account solely for the purpose of implementing a development project for which the relevant account is kept (art. 8 of the Act on the protection of the purchaser of dwelling premises or a detached house)[9]. Withdrawals from this account can be made only after the bank determines that the individual stage of the execution of the investment project has been completed (art. 11 of the Act on the protection of the purchaser of dwelling premises or a detached house). It is assumed that the withdrawals should be made in proportion to the payments made (Czech 2013, p. 170). The stages of the implementation of the developer project should be specified in the schedule of the project. There may not be fewer than four of them (Lic 2015, p. 179). The provisions of the Act on the protection of the purchaser of dwelling premises or a detached house introduce numerous even more specific protection measures for the payments made by the purchasers of premises, such as the obligation to inform the buyer of the deposits and withdrawals made (art. 5.3 of the Act on the protection of the purchaser of dwelling premises or a detached house), the ban on changing the account agreement without the consent of the buyer (art. 6 paragraph 4 of the Act on the protection of the purchaser of dwelling premises or a detached house), or limiting the ability to terminate the contract only to important reasons (art. 5.4 of the Act on the protection of the purchaser of dwelling premises or a detached house) (Lic 2015, p. 180).

As a consumer, the buyer is protected in the real estate development contracts not only at the stage of concluding the contract, but also at the stage of its

[8] See the report of the Office of Competition and Consumer Protection "Consumer in the developer market", announced in January 2014, https://uokik.gov.pl/raporty2.php (accessed: 2.02.2017), pp. 25–28.

[9] This provision is regarded as excessively restrictive (Burzak, Okoń & Pałka 2012, pp. 130–131).

implementation. Non-performance or improper performance of an obligation by the developer can consist in providing the real property with defects, providing the property but after a delay or a failure to provide the real property. The developer's liability for the failure to perform the obligations is subject to the regulatory consequences of default of mutual agreements (art. 487 *et seq*. of the Civil Code). This regulation was developed and specified in the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house. The purchaser has the right to withdraw from a developer contract in the event of a failure to transfer to the purchaser the ownership of the real property within the period specified in the real estate development contract (art. 29 paragraph 1 point 6 of the Act on the protection of the purchaser of dwelling premises or a detached house). Earlier, however, the buyer should appoint for the developer a 120-day deadline for the transfer of this right. Then, and only in case of ineffective expiry of the deadline, shall the purchaser be entitled to withdraw from this contract[10]. The purchaser also retains a claim for a contractual penalty for the delay period (art. 29 paragraph 3 of the Act on the protection of the purchaser of dwelling premises or a detached house), despite the fact that withdrawal from the contract will take *ex tunc* effect, which means as if the contract had never been concluded.

Enhanced consumer protection was included in the Law on Bankruptcy and Reorganisation of 2003[11]. The provisions of bankruptcy proceedings against developers were introduced to this Act under art. 36 of the Act on the protection of the purchaser of dwelling premises or a detached house. The essence of the protection of the buyer in these provisions was the creation of, out of the funds and additional payments of the purchasers of the premises, a separate bankruptcy estate. This estate was designed, first, to meet the claims of the purchasers of residential premises or detached houses, covered by the developer project (art. 425^2 of the Bankruptcy and Reorganisation Act) and the possibility to satisfy the claims of the purchasers from the funds collected in escrow accounts or to allow the continuation of a development project by the manager or the receiver (art. 425^4 paragraph 1 of the Bankruptcy and Reorganisation Act). The revised Bankruptcy and Reorganisation Act, which has been in force since 1 January 2016[12], also provides for the receiver to continue the project of the bankrupt developer with the permission of the judge-commissioner (art. 425e paragraph 1 of the Bankruptcy Act), provided that in the earlier recovery proceedings the purchasers adopted a resolution on additional payments and paid or secured these additional payments,

[10] The standpoint that this is an abusive clause is presented by B. Pawlak (2012, p. 1315). A similar critical view has been expressed by J. Pisuliński (2013), p. 792.

[11] Act of 28 February 2003 – Act on Bankruptcy and Reorganisation (Journal of Laws of 2009, No 175, item 1361, as amended), hereinafter: Bankruptcy and Reorganisation Act.

[12] The current name: "Bankruptcy Act", hereinafter: Bankruptcy Act.

but the arrangement with the bankrupt developer did not come into effect. If the receiver withdraws from the continuation of a development project, the receiver should pay back the additional payments to the purchasers as a whole (art. 425e paragraph 3 of the Bankruptcy Act). After the judge-commissioner has issued permission to cease pursuing the development project, the receiver should inform the bank which keeps the residential escrow account for this development project of this fact and should submit an instruction to return the funds in the account to the purchasers (art. 425h paragraph 4 of the Bankruptcy Act).

3. An Evaluation of the Impact of EU Law on the Protection of Purchasers under the Regulations of the Act on the Protection of the Purchaser of Dwelling Premises or a Detached House

The greatly belated legal regulation aimed at the protection of the purchasers of dwelling premises or a detached house contained in the regulations of the Act on the protection of the purchaser of dwelling premises or a detached house and the Bankruptcy Act is indeed an autonomous achievement of the Polish legislature. It was created independently of the directives of the European Union. In the explanatory memorandum to the draft Act on the protection of the purchaser of dwelling premises or a detached house it was merely stated that in most countries of the European Union, the law protects the customers of development companies. It was likewise noted that the draft is not contrary to EU law[13]. However, in the legal opinion of the Office of Parliamentary Analyses, as of 16 June 2011, it was emphasised that the provisions of the draft law have an indirect connection with Directive 2005/29/EC, which prohibits unfair commercial practices in business--to-consumer dealings prior to, in the course of and after the conclusion of a commercial transaction. Because this Directive defines unfair trade practices and sets their examplary catalogue, it pursues the same objective the said draft law was guided by. Moreover, the Office of Parliamentary Analyses states that the said Directive requires Member States to ensure, in the interests of consumers, adequate and effective means to combat unfair practices, including the misleading of consumers. In addition, in accordance with art. 3.9, in relation to real property, Member States may impose more restrictive or more prescriptive requirements than those imposed in this Directive. Hence, in this respect, Directive 2005/29 applies the minimum harmonisation model. Moreover, the authors of the legal opinion of the Office of Parliamentary Analyses are right to claim that the EU

[13] Parliamentary printed matter of the Sejm of the Republic of Poland of VI term, no 4349 of 9 June 2011, http://ww2.senat.pl/k7/dok/sejm/083/4349.pdf (accessed: 2.02.2017), pp. 21 and 30.

directives only provide a minimum level of protection in consumer contracts and, therefore, by adopting the said draft law, the Polish legislature uses the regulatory freedom entrusted to it by the power of consumer directives[14].

Without a doubt the Act on the protection of the purchaser of dwelling premises or a detached house pursues the overall objective of consumer protection, which is also the aim of the European Union law. This trend of consumer protection can also be seen in model law, in particular in the Principles of European law on service contracts[15]. It should be noted, however, that these rules are not mandatory and therefore they can only be treated as guidelines forsolutions that may one day be written down in European law (Gliniecki 2012, p. 87). It may surprise some to learn that EU law does not contain a directive that would impose an obligation on Member States to introduce regulations that protect the consumer in real estate development contracts, although the directives regulating the areas of consumer protection associated with a significantly lower financial risk and a weaker social impact were enacted many years ago[16].

This overall assessment is not affected by relatively recent legislative changes related to the adoption of the Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights[17], which amended Directive 93/13 on unfair terms in consumer contracts[18]. The implementation of

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[14] Parliamentary printed matter BAS-WAPEiM No 1471/11 of 16 June 2011, http://ww2.senat.pl/k7/dok/sejm/083/4349.pdf (accessed: 2.02.2017, p. 31).

[15] Principles of European Law on Service Contracts (PEL SC) of 2007, which are the effect of the work of the team working in Tilburg in the Netherlands under the auspices of the Research Group on European Civil Code (Bartels & Giesen 2007, p. 169).

[16] These include the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (Official Journal of the European Union, series L 158 of 23 June 1990), or Directive 98/6/EC of the European Parliament and the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers (Official Journal of the European Union, series L 80 of 18 March 1998), and, among more recent ones, the Directive of the European Parliament and Council 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Official Journal of the European Union, series L 33/10 of 3 February 2009).

[17] Directive of the European Parliament and of the Council 2011/83/EU of 25 October 2011 on consumer rights (Official Journal of the European Union, series L 304/64 of 22 November 2011).

[18] Council Directive 93/13 of 5.04.1993 on unfair terms in consumer contracts (OJ L 95/29, 21.04.1993). This directive applied to unfair terms in consumer contracts (the so-called "abusive contract terms", mainly in the form of contract models), which was implemented into the Polish law in art. 385^1–385^3 of the Civil Code. As B. Gnela aptly notes, contracts providing for an obligation to sell real property, contracts of obligation and disposition and contracts transferring the ownership of real property cannot be concluded using a model contract; hence the need to protect the consumer--buyer of the real property against abusive contract terms not negotiated individually (art. 385^1–385^3 of the Civil Code) does not seem to be of any greater importance (Gnela 2013, p. 302).

this Directive was made in the Consumer Rights Act[19]. It imposes upon the trader a number of obligations to provide information as well as many other consumer protection solutions. However, pursuant to art. 4 paragraph 1 of the Consumer Rights Act, the provisions of this Act shall not apply to contracts relating to the creation, acquisition and transfer of immovable property or other property rights and to contracts for rental of accommodation for residential purposes. It should therefore be recognised that this provision precludes the Consumer Rights Act from being applied to real estate development contracts.

4. The Impact of European Union Law Protecting the Purchaser against Defective Performance of a Contract

A separate sphere of influence of European law on the protection of purchasers of residential premises or a detached house is set by the regulations of EU directives related to the quality of performance. Essential to this issue is Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods[20]. This Directive was implemented in 2002 to Polish law by the Act on special conditions of consumer sales and amending the Civil Code[21]. Since then, a period of dualism of legal regulations of the seller's liability for defects has begun, since the implementation related only to sales contracts concluded between the trader and the consumer, while the regulation of the seller's liability for defects in trade between the traders and in general commerce is covered by the regulations of the Civil Code. This Act also covers specific task contracts, supply contracts and consignment agreements.

Directive 1999/44/EC and its implementation into Polish law had no effect on shaping the liability of the developer for defects of a building, because, first, art. 27 paragraph 6 of the Act on the protection of the purchaser of dwelling premises or a detached house refers directly to the Civil Code and not to the implementation of Directive 1999/44/EC in the Act on special conditions of consumer sales. Secondly, art. 1 paragraph 1 of the Act on specific conditions of consumer sales limited its subjective scope only to the sale of movable property to an individual. In this

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[19] Act on consumer rights of 30 May 2014 (Journal of Laws of 2014, item 827, as amended), hereinafter: the Consumer Rights Act.

[20] Directive of the European Parliament and of the Council 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and guarantees for consumer goods (Official Journal of the European Union, series L 171 of 7 July 1999), hereinafter: the Directive.

[21] The Act of 27 July 2002 on special conditions of consumer sales and amending the Civil Code (Journal of Laws of 2002, No 141, item 1176, as amended), hereinafter: the Act on special conditions of consumer sales.

situation, a certain new quality in the consumer protection law was created by Directive 2011/83/EU of 25 October 2011 on consumer rights. The implementation of this Directive into Polish law in the Consumer Rights Act has been combined with the reimplementation of Directive 1999/44/EC into the Civil Code. According to art. 52 and art. 55 of the Consumer Rights Act, on 25 December 2014 this Act came into force, and on the same day the Act on special conditions of consumer sales ceased to be binding. This brought to an end the period of dualism in the regulation of the liability for the quality of performance in sales contracts, specific task contracts, supply contracts and consignment agreements.

The impact of Directive 1999/44/EC on consumer protection in real estate development contracts on the quality of service may be traced back no further than 25.12.2014. This impact happened contrary to the intentions of the EU legislature, who in art. 1 paragraph 2b of the Directive defines consumer goods as any tangible movable items. In accordance with art. 1 paragraph 1 of the Directive, the regulation applies to the sales of such goods and not immovable property. Provisions of Directive 1999/14/EC have had an impact on consumer protection in real estate development contracts only because the Polish legislature, upon the implementation of the Directive in the Civil Code, as part of the regulation of the statutory warranty in sales contract, also derogated a separate regulation for the statutory warranty for defects of a specific work, and the regulation for the contractual warranty (guarantee) in sales contracts was extended to cover the contractual warranty (guarantee) for specific work, as, according to the new wording of art. 638 paragraph 1 of the Civil Code introduced in art. 44 item 35 of the Consumer Rights Act, the liability for defects of specific work will also be regulated by the provisions on the statutory warranty in sales contracts and, in accordance with paragraph 2, if the ordering party was granted contractual warranty (guarantee) for the specific work performed, the provisions of the contractual warranty in sales contracts will apply accordingly.

For the purchasers of premises who act as consumers, these solutions mean that they are protected under the harmonised provisions of the Civil Code in respect of the statutory warranty and contractual warranty (guarantee) in sales contracts, regardless of whether the real estate development contract is considered as a subtype of the specific task contract or a subtype of the sales contract. This issue was disputed in the doctrine and remains unresolved (Pisuliński 2012, p. 439 ff; Lic 2013, p. 147 ff; Strzelczyk 2013, p. 302 and pp. 306–307; Burzak, Okoń & Pałka 2012, p. 257; Goldiszewicz 2013, p. 97). The difference lays currently only in the fact that in the event the real estate development contract is recognised as a sub-type of specific task contract, the provisions of the statutory warranty in the sales contract shall be applied accordingly and not directly to the defects in a building.

The concept of defect has a crucial significance for the liability described under the statutory warranty for defects in a building, such as dwelling premises or a detached house. Art. 2 of the Directive 1999/44/EC provides that the seller must deliver to the consumer goods which are in conformity with the contract of sale. The Civil Code, when implementing the provisions of the Directive, identifies in art. 556^1 paragraph 1 the notion of a physical defect with the concept of non-conformity of goods with the contract covering them. In addition, art. 556^1 paragraph 1 point 2 of the Civil Code, after art. 2 paragraph 2 of the Directive, specifies that the goods are not in conformity with the contract when they do not have the qualities which were ensured to the buyer by the seller (Loranc-Borkowska 2015, p. 106 ff). This provision complies with the provisions contained in art. 17–19 of the Act on the protection of the purchaser of dwelling premises or a detached house that impose on the developer the obligation to provide an information prospectus.

In respect of the liability under statutory warranty, the concept of the defect is equally important as the fact of determining the moment in which the liability arises. According to art. 3 paragraph 1 of the Directive, the seller shall be liable to the consumer for any lack of conformity which exists at the moment of delivery of the goods. In the transposition into the Civil Code, the liability under statutory warranty is determined by the moment at which the risk is transferred to the buyer (art. 559 of the Civil Code). The risk of accidental loss or damage to goods, and in the real estate development contracts – to a building, passes to the buyer at the moment the object is delivered (art. 548 paragraph 1 of the Civil Code). If the buyer (the purchaser) is a consumer and the physical defect was found within one year of the date of the delivery of the premises or a detached house, it shall be presumed that the defect or its cause existed at the time of the transfer of the risk to the buyer (art. 556^2 of the Civil Code).

A certain modification has been introduced by art. 27 paragraph 1 of the Act on the protection of the purchaser of dwelling premises or a detached house, which states that the transfer of the ownership to the buyer is preceded by the acceptance of the dwelling premises or a detached house. The legal nature of the acceptance is disputed in the doctrine (Strzelczyk 2013, p. 302 and pp. 305–307; Czech 2013, p. 405; Burzak, Okoń & Pałka 2012, p. 257; Goldiszewicz 2013, p. 97). It should be recognised that as *lex specialis*, art. 27 paragraph 1 of the Act on the protection of the purchaser of dwelling premises or a detached house stipulates the beginning of the period to exercise the powers under the statutory warranty is not from the delivery of the subject matter of the contract but from its qualitative (technical) acceptance. If the parties have agreed so, the acceptance may be connected with the delivery in the sense of the transfer of ownership.

The provisions of the Civil Code governing the premises of the liability for defects in the goods sold are directly applicable to defects of a building. The developer is exempt from the liability under statutory warranty, if the buyer knew of the defect at the time of conclusion of the contract (art. 557 paragraph 1 of the Civil Code). If the subject matter of the contract is to be created in the future, which is typical for real estate development contracts, the developer is exempt from liability if the purchaser knew of the defects at the time of the goods were delivered (art. 557 paragraph 2 of the Civil Code). This does not apply to instances when the buyer acts as a consumer, which is indeed the case in the vast majority of real estate development contracts. In those cases, the following principle shall apply: the developer is exempt from liability if the buyer knew about the defects at the time the contract was concluded. An example of such a situation is when the buyer had access to the project documentation. These principles constitute the implementation of art. 2 paragraph 3 of the Directive, which states that there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity.

Exercising the powers under the statutory warranty for defects in a building differs to a considerable extent from exercising the rights arising from the sale of things. These differences arise from the specific regulation in the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house. These provisions provide that the qualitative inspection ends in drafting the protocol in which the buyer can report defects of the dwelling premises or of a detached house (art. 27 paragraph 3 of the Act on the protection of the purchaser of dwelling premises or a detached house). Then, the developer is obliged, within 14 days of the date of signing the protocol to deliver to the purchaser a declaration recognising the defects or on refusing to recognise the defects and its causes (art. 27 paragraph 4 of the Act on the protection of the purchaser of dwelling premises or a detached house). The Civil Code does not provide for such an obligation. Within 30 days of the date of signing the protocol, the developer is obliged to remove the defects found in the dwelling premises or in a detached house. If the developer, despite acting with due diligence, fails to remove the defects within the indicated deadline, he may indicate another appropriate date for the removal of the defects, and provide the reasons for the delay (art. 27 paragraph 5 of the Act on the protection of the purchaser of dwelling premises or a detached house).

As follows from the above regulations, if the developer recognises the existence of the defects, then the purchaser is not entitled to free choice of rights under the statutory warranty (Czech 2013, pp. 409–410)[22]. This restriction, however, is valid

[22] Conversely and inaccurately (Burzak, Okoń & Pałka 2012, pp. 272–273).

only until the deadline to remove the defects has not yet expired. If the developer refuses to recognise the defects or to remove them, when the defects are indelible or the developer does not remove them in time, and when the defects are disclosed after the acceptance, art. 27 paragraph 5 of the Act on the protection of the purchaser of dwelling premises or a detached house does not apply, and the buyer has the freedom to choose the rights under the statutory warranty. Accordingly, the buyer can withdraw from the contract or submit a statement requesting a reduction of the price. Withdrawal from the contract, however, is possible only when the defect is significant (art. 560 paragraph 4 of the Civil Code). The developer is entitled to a corresponding right consisting in the fact that it can promptly and without undue inconvenience to the buyer remove the defect (art. 560 paragraph 1 sentence 1 of the Civil Code). The regulation in respect of the purchaser's rights constitutes the implementation of art. 3 paragraphs 2–6 of the Directive. Because the Directive ensures free choice of the entitlements by the buyer, the limits of this freedom arising from the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house can be regarded as inconsistent with this Directive.

The final subjective scope of the liability for non-conformity with the contract, as covered by the provisions of the Directive, is the provisions on the terms of the statutory warranty. Art. 5 paragraph 1 of the Directive provides that the seller bears liability, under art. 3, when the lack of conformity becomes apparent within two years of the date the goods are delivered. The implementation of this provision into the Civil Code provides more rights to the consumer. As is apparent from art. 568 paragraph 1 of the Civil Code, in the case of contracts for the sale of real estate, the developer bears liability under the statutory warranty if the physical defect is found within five years of the date the subject matter of the contract has been delivered to the purchaser have elapsed. During this period, the purchaser should submit a declaration that he is exercising his powers under the statutory warranty (art. 568 § 3 sentence 1 of the Civil Code). According to art. 568 paragraph 2 of the Civil Code, a claim for the removal of defects or (exceptionally) for the exchange of the subject matter of the contract for the one free from defects expires after one year of the date a defect is discovered. If the buyer is a consumer, the limitation period cannot end before the expiry of the five-year period in which the defect must be found. Pursuant to art. 568 paragraph 4 and paragraph 5 of the Civil Code, pursuing in the court of general jurisdiction, in court of arbitration or in mediation proceedings one of the rights under the statutory warranty results the suspension of the deadline for the execution of other powers enjoyed by the purchaser.

In the case of a guarantee (contractual warranty), the provisions of the Directive are very general and allow different solutions. Two provisions in this

respect are crucial, namely that the contractual warranty shall be legally binding on the provider of this warranty under the conditions laid down in the guarantee statement and the associated advertising (art. 6 paragraph 1 of the Directive), and that on request by the consumer, the guarantee shall be made available in writing or prepared in another durable medium available and accessible to him (art. 6 paragraph 3 of the Directive). The implementation of these provisions has been included in art. 577 paragraph 1 sentence 2 of the Civil Code, which states that the guarantee statement may be made in advertising as well as in art. 577^2 of the Civil Code, which authorises the holder of the guarantee to demand from the guarantor the issuance of the guarantee statement, made on paper or on another durable medium (the guarantee document).

5. Conclusions

The impact of EU law on the protection of the consumer as a buyer of dwelling premises or a detached house in real estate development contracts is not homogeneous. In the area of the protective rules introduced to the Polish legal system by the provisions of the Act on the protection of the purchaser of dwelling premises or a detached house, this effect lies only in the fact that the EU legislation indicates and supports the overall objective of the regulation, namely protecting consumers. This is reflected in the adoption of a number of directives of a more or less general character, the object of which is the legal protection of the consumer. This does not change the fact that in the sphere of development activity, there is no relevant directive, and therefore the impact of EU law in this area remains limited.

The minimum ten-year-long delay in the proper legal regulation of real estate development contracts, the social effects of which have been exceedingly harmful, are the fault of, in equal measure, the Polish State and the European Union. The Polish State has failed to fulfill an obligation stemming from art. 76 of its Constitution. In violation of the injunction of the consumer protection against unfair market practices contained therein, the public authorities have essentially stood aside in consent as the estates of consumers were plundered. The European Union has not exercised the competence granted to it under art. 4 and art. 169 of the Treaty on the Functioning of the European Union (consolidated version)[23] to apply the measures which support, supplement and monitor the policy pursued by Member States in the field of consumer protection.

Liability for the defects of the subject matter of a contract is regulated by the EU law in Directive 1999/44/EC. After this Directive was re-implemented in

[23] Official Journal of the European Union, series C 326/47 of 26 October 2012.

the Civil Code, it was therefore fully applicable to the real estate development contracts, despite the fact that the Directive itself does not require this, because it only refers to the sale of movable property. As a result, within the scope of Directive 1999/44/EC, the buyers of premises and detached houses enjoy protection equal to that afforded buyers in sales contracts.

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Wpływ prawa europejskiego na ochronę konsumenta w umowach deweloperskich

(Streszczenie)

Umowa deweloperska została częściowo uregulowana w ustawie o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego. Środki ochrony konsumenta przewidziane w tej ustawie można podzielić na: związane z zabezpieczeniem jego interesu przy zawarciu umowy, zabezpieczające jego wpłaty oraz odnoszące się do etapu wykonania zobowiązania dewelopera. Ponadto ustawa przewiduje sankcje cywilnoprawne i sankcje karne obowiązków dewelopera. Wpływ prawa Unii Europejskiej na przyjęte rozwiązania jest niejednolity. Z jednej strony prawodawstwo unijne wskazuje i wspiera ogólny cel regulacji, jakim jest ochrona konsumenta. Z drugiej strony brak odpowiedniej dyrektywy dotyczącej ochrony konsumenta w umowach deweloperskich. Unia Europejska nie skorzystała niestety z kompetencji, jaką daje jej art. 4 i art. 169 Traktatu o funkcjonowaniu Unii Europejskiej. Jedynie w sferze odpowiedzialności za wady przedmiotu umowy można dopatrzyć się bezpośredniego wpływu prawa unijnego, gdyż w tym zakresie obowiązuje w Unii Europejskiej dyrektywa 1999/44/WE.

Słowa kluczowe: umowy deweloperskie, nabywca lokali, prospekt informacyjny, rachunek powierniczy, ustawowa gwarancja na wady, odstąpienie od umowy, dyrektywa UE.

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Implementation of the Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes – Historical Background and Legal Consequences of a Failure to Transpose the Directive within the Prescribed Time

Abstract

The purpose of this article is to undertake a legal analysis of the legal process of implementing Directive 2013/11/EU into the Polish legal order and to present the legal consequences of a failure to transpose the Directive within the prescribed period. In the first part, the author presents the description of work that has been done at the EU level on the alternative resolution of consumer disputes and evaluates the proposals for specific legal solutions presented in the course of this work. The author then presents the main issues and challenges associated with the process of the transposition of Directive 2013/11/EU. In particular, the author reflects on the direct effect of Directive 2013/11/EU, in both vertical and horizontal terms. As a result, the author concludes that the failure to implement the Directive in the prescribed period initiates the State's liability to an individual for damage caused by the lack of proper implementation and imposes on the national courts the duty of applying a pro-EU interpretation of national law. In turn,

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in the light of the well-established case law of the CJEU, and given the nature of the analysed Directive, the lack of a proper implementation of Directive 2013/11/EU within the prescribed period, does not entitle the consumer to effectively assert his rights against the trader for non-fulfillment of the obligations resulting from the Directive.

Keywords: consumer, ADR, directive, implementation, direct effect.
JEL Classification: K410, K490.

1. Introduction

On 18 June 2013, there was published in the Official Journal of the European Union legislative package, which consists of: Directive of the European Parliament and of the Council 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes[1] (i.e. "the directive on ADR in consumer disputes") and the Regulation of the European Parliament and of the Council (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes, i.e. the ODR (Online Dispute Resolution) Regulation in consumer disputes[2]. These legal acts are linked and they complement each other[3]. Their aim is to improve the functioning of the retail internal market, and in particular to facilitate the process of pursuing claims by consumers, among others, via the Internet[4]. Thanks to the newly proposed system of out-of-court procedures the pursuance of these claims is to be more efficient, and the settlement of consumer disputes should become quicker and cheaper. Although the deadline for the implementation of the ADR Directive for consumer disputes expired on 9 July 2015, the Polish legislator has adopted the law on the out-of-court resolution of

[1] Official Journal of the European Union, series L 165 of 18 June 2013.

[2] Official Journal of the European Union, series L 165 of 18 June 2013. The provisions of ODR Regulation in consumer disputes are applied since 9 January 2016, except for: art. 2 paragraph 3 and art. 7 paragraph 1 and 5, which are applicable since 9 July 2015; and art. 5 paragraph 1 and 7, art. 6, art. 7 paragraph 7, art. 8 paragraph 3 and 4, art. 11, 16 and 17, which are applicable since 8 July 2013.

[3] According to art. 288 (ex art. 249 TEC) of the Treaty on Functioning of the European Union regulations a regulation shall have general application and it shall be binding in its entirety and directly applicable in all Member States. Thus, regulation No 524/2013 unifies the law on consumer ADR in online disputes by introducing uniform standards for the protection of the weaker party (consumer) in the digital services market. The platform for online disputes is available in all official languages of the European Union at: http://ec.europa.eu/consumers/odr/. This platform is intended to reduce concerns about complaints when purchasing goods in a foreign e-shop and thus foster the development of cross-border trade.

[4] Cf. the proposal EC 2011/0373 (COD) of 29 November 2011 on the implementation of ADR Directive in consumer disputes, COM (2011) 793, p. 2.

consumer disputes[5] only on 10 January 2017. During the work on the shape of the law implementing the Directive on consumer ADR, the Council of Ministers first adopted on 31 March 2015 the assumptions for the draft law on out-of-court resolution of consumer disputes[6], then on 14 June 2016 it submitted to the Sejm of the Republic of Poland the official draft law on the consumer ADR with merits of reason for further proceedings[7]. The aim of this study is twofold: to present the current achievements of the European Union on the issue of out-of-court methods of resolving consumer disputes and to describe the main problems and challenges related to the implementation of Directive 2013/11/EU.

2. The Purpose and the Basic Principles of the Directive on the Consumer ADR

From the point of view of the functioning of the single market in the European Union, and in particular from the perspective of the safety and security of trading in this market and the increase of the consumers' confidence in the internal market[8], the directive on ADR in consumer matters is of great importance. For entrepreneurs themselves and for so-called ADR entities[9], it sets forth certain standards for resolving disputes in an alternative manner to common court litigation. It also imposes a number of obligations on these two groups of entities, in particular the obligation to provide information. In drafting the legislation,

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[5] Official Journal No 1823 of 9 November 2016.

[6] The draft guidelines to the law on out-of-court resolution of consumer disputes of 18 March 2015, developed by the President of the Office of Competition and Consumer Protection, number: DDK-076-249/14/PM/ISZK, no from the list ZC39; hereinafter: assumptions to the act of law.

[7] The draft law on out-of-court resolution of consumer disputes of 14 June 2016 developed by the Government Legislation Centre, no from the list: UC36; hereinafter: draft law.

[8] As can be read in recital 15 of the preamble of the Directive on the consumer ADR: "The development within the Union of properly functioning ADR is necessary to strengthen consumers' confidence in the internal market, including in the area of online commerce, and to fulfill the potential for and opportunities of cross-border and online trade. Such development should build on existing ADR procedures in the Member States and respect their legal traditions".

[9] The directive on ADR in consumer cases defines an ADR entity in art. 4 paragraph 1 point h, as "any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure and that is listed in accordance with Article 20(2) of this Directive". In turn, the draft law uses the term of "authorised entity" and describes it as "an entity entered in the Register (…)", which "conducts proceedings on the out-of-court settlement of consumer disputes in accordance with the procedures of such proceedings applicable at a given authorised entity, hereinafter referred to as the rules".

the EU legislator foresaw an alternative dispute resolution (hereinafter: ADR[10]) that would be inexpensive and fast, and a simple alternative for the common courts of law in the Member States and a universal panacea for the excessive length of court cases in many countries of the European Union[11]. The directive in its premise is to create a uniform, comprehensive system of alternative dispute resolution for consumer disputes in all Member States. It is expected to cover all disputes in the EU market between the consumer and the trader arising from contracts concluded for the sale of goods or provision of services, including contracts concluded via the Internet and cross-border contracts[12]. The system is intended to serve the consumer and to improve the consumer's unequal position in relation to traders in the goods and services market. The Directive provides the Member States with flexibility in choosing the appropriate model of ADR entities for a given Member State[13]. The institutional model provided for in the act on out-of-court resolution of consumer disputes is based on the so-called mixed approach, which assumes

[10] The abbreviation "ADR" stands for alternative dispute resolution. To clarify, for the purposes of this publication, when using the concept of ADR, the author has in mind the broad definition of ADR, including all out-of-court methods of dispute resolution – negotiation, mediation, conciliation and arbitration. The concept of "ADR" has evolved over time. In the past arbitration was usually in formal EU documents not covered by the scope of ADR (so: Green Paper of 19 April 2002, (COM (02) 196 final)). This document defines the notion of "alternative dispute resolution" as "non-judicial dispute resolution procedures conducted by a neutral third party with the exception of arbitration". The view that arbitration should not qualify as an alternative method of dispute resolution has been expressed, among others, by (Rajski 2001, p. 38 ff; Szurski 2003, pp. 87–88). The opposite is expressed, among others, by (Błaszczak 2007, p. 345; Wach 2005, pp. 136–139; Weitz 2007, p. 15; Allison 2005, pp. 165–166; Carver & Vondra 2005, pp. 214–216; Strome 1989, p. 25; Cornu 1997, p. 314; Piasecki 1995, p. 258; Safjan 2002, p. 114). At present, the dominant view is that arbitration is also included in ADR. For instance, under Directive 2013/11/EU the arbitration, if the Member State decides this way, may fall within the scope of the act. In recital 20 of the Directive, it is stated that the Directive may also cover, if Member States so decide, ADR entities which impose a solution upon the parties, which however excludes the procedures conducted before the entities formed at an ad-hoc basis. Hence, the decision whether arbitration will be available or permissible in consumer disputes is to be made by each Member State. However, if a Member State permits consumer disputes to be resolved by arbitration, Directive 2013/11/EU shall apply to these arbitration proceedings as well, with the exclusion of ad-hoc arbitration proceedings.

[11] Cf.: justification for the draft law, p. 2 ff.

[12] A detailed justification of the choice of the mixed, so-called horizontal model, can be found in the guidelines to the act of law on out-of-court resolution of consumer disputes of 18 March 2015, pp. 14–15.

[13] Cf.: Point 20 and 24, and so: "Where appropriate, in order to ensure full sectoral and geographical coverage as well as access to ADR, the Member States should be able to ensure the creation of an additional ADR entity that deals with disputes in respect of which no specific ADR entity is appropriate. Additional ADR entities are to provide security for the consumers and the traders by eliminating gaps in access to ADR entities".

the existence of sectoral entities and horizontal coverage[14]. For the most part the model is already working and requires only minor legislative changes. It will take into account the existing structures of public and private ADR entities as well as the procedures developed in their framework[15]. It will also provide the opportunity to create new ADR entities, assuming that both of these groups will adapt their regulations to the requirements of the Directive. This model ensures a consistency and completeness that makes it possible for the relevant and competent ADR entity to resolve every consumer dispute (within the scope of the Directive).

Referring to the issue of a procedural nature concerning ADR measures in the Polish legal system, it should be noted that the Polish legal system is already largely developed in the field of alternative dispute resolution – both in internal and external nature (Morawski 1993, p. 21, 2003, p. 228; Wach 2005, pp. 122–125; Gajda 2008, p. 12). In this respect, there was no need for implementing major changes[16]. Among the broadly defined so-called internal alternatives to the judicial pursuance of claims – namely those that are the result of already initiated proceedings in court – there should be indicated, in particular, the desire of the court to reach a settlement and conciliation proceedings (art. 10, 104, 184–186 and 223 of the Act of 17 November 17 1964 – Civil Procedure Code[17]), as well as mediation proceedings (cf. art. 10, 981, art. 103 paragraph 2, art. 1041, 1831–18315, 2021, 2591, art. 355 paragraph 2, art. 394 paragraph 1 point 101, art. 777 paragraph 1 point 21 of the Civil Procedure Code). Among the external alternatives to civil proceedings in consumer cases, the following examples are noteworthy: proceedings before permanent arbitration courts for consumers at provincial commercial inspections[18], the Arbitration Court at the Polish

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[14] This approach assumes the coexistence of sectoral ADR entities (e.g. in the financial services sector, telecommunications, energy regulators, etc.) and the ADR entity of a horizontal nature, which would be appropriate in all consumer issues not specifically reserved for a particular sector entity. In the Polish model, the role of a horizontal entity is assigned to the Trade Inspection.

[15] A characteristic feature of the mixed model is the co-existence of ADR entities of business character and ADR entities of public character. The standards of the operation of ADR entities are based both on self-regulations as well as on the provisions of commonly applicable law. For more see: Assumptions to the act of law, pp. 10–11.

[16] It is important, however, that the internal regulations of individual ADR entities should be tailored to the requirements of the Directive.

[17] Journal of Laws of 2014, item 101 as amended, hereinafter: Civil Procedure Code.

[18] These proceedings are regulated, among others, in art. 3 point 4, art. 37 and art. 43 of the Act of 15 December 2000 on Trade Inspection (Journal of Laws of 2016, item 1059, as amended), in the Regulation of the Minister of Justice of 25 September 2001 on determining the rules of organisation and operation of permanent arbitration courts for the consumers (Journal of Laws No 113, item 1214), in the Regulation of the Prime Minister of 2 August 2001 on the lists of experts for the quality of products or services (Journal of Laws No 85, item 931).

Financial Supervision Authority[19], Banking Consumer Arbitration, the Court of Arbitration at the Polish Bank Association and the Court of Arbitration at the Polish Chamber of Commerce and, lastly, complaint proceedings[20]. Some of the external alternatives in the consumer cases are classified as civil proceedings (e.g. arbitration proceedings), while others – including negotiations – do not constitute formal procedures, but only a technique intended to bring the parties closer to agreement. These ADR measures implemented into the Polish legal system of course require certain regulations and unification. This role has been foreseen for the EU legislative package on consumer ADR and the Act of law that has been prepared on alternative methods of resolving consumer disputes. Note also that while the Directive on the consumer ADR takes precedence over other acts of law on alternative dispute resolution methods, it should be without prejudice to the provisions of the Directive of the European Parliament and of the Council 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters[21], which establishes a framework for the systems of mediation at the Union level in the case of cross-border disputes. At the same time it does not prevent its application in relation to internal mediation systems[22]. Directive 2013/11/EU is to be horizontally applicable to all types of ADR proceedings, including ADR proceedings covered by Directive 2008/52/EC.

This publication focuses here exclusively on the implementation of the directive on ADR in consumer issues, leaving aside both the specific provisions of the national law as well as the analysis of the individual solutions contained in ODR Regulation. It thus refers only generally to the draft law on consumer ADR[23].

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[19] Established pursuant to art. 18 paragraph 1 of the Act of 21 July 2016 on financial market supervision (Journal of Laws of 2016, item 174, as amended), and acting on the basis of the Rules of the Arbitration Court at the Financial Supervision Authority annexed to Resolution No 61/2016 of the Financial Supervision Authority dated 19 January 2016.

[20] The mandatory complaint procedure on consumer issues is regulated in the Act of 5 August 2015 on the consideration of the complaints by the entities of the financial market and on the Commissioner for Finance (Journal of Laws of 2016, item 892), as well as, among others, in the Act of 16 July 2004 – Telecommunications Law (Journal of Laws No 171, item 1800, as amended), the Act of 12 June 2003 – the Postal Law (Journal of Laws No 130, item 1188, as amended), or in the Act of 29 August 1997 on tourist services (unified text: Journal of Laws of 2004, No 223, item 2268, as amended).

[21] Official Journal of the European Union, series L 136 of 24 May 2008, p. 3.

[22] Cf.: recital 19 of the preamble of the Directive on consumer ADR.

[23] See recital 12 of the preamble of the Directive on consumer ADR: "This Directive and Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes are two interlinked and complementary legislative instruments. Regulation (EU) No 524/2013 provides for the establishment of an ODR platform which offers consumers and traders a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality

3. The Legislative Work on Consumer ADR at the European Level

Increased interest among EU institutions in out-of-court methods of resolving consumer disputes has been observed for several years[24], but it was only in 2015 that the European Union adopted a comprehensive package of consumer ADR. The achievements of these years of work on the proper shape and form of the regulation clearly contributed to the current state of the EU ADR legislation. In the course of the work on the current shape of consumer ADR in the European Union, two networks dealing with cross-border consumer dispute have been created, ECC-NET and FIN-NET[25]. Further, two European Commission's recommendations have been issued on consumer ADR[26] and a number of other acts developed in the form of green papers, action plans and communications have been published[27]. Early initiatives put forth by EU institutions amounted to soft law, non-binding acts, and did little more than define desirable directions. They were vague, and the demands they included had little impact on practical redress for consumers[28]. In general, the most significant and specific of these initiatives were two European Commission's recommendations (Hodges 2012,

ADR procedures. The availability of quality ADR entities across the Union is thus a precondition for the proper functioning of the ODR platform".

[24] Initially, the EU soft law represented only the minimum criteria for the use of ADR methods.

[25] Information on ECC-NET and FIN-NET is available at: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm (accessed: 15.10.2016) and http://ec.europa.eu/finance/fin-net/index_en.htm (accessed: 15.10.2016).

[26] Commission Recommendation 98/257/EC of 30 March 1998 on the rules that apply to the bodies responsible for out-of-court settlement of consumer disputes (Official Journal of the European Union 1998 L 115/31) and Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (Official Journal of the European Union 2001 L 109/56).

[27] Green Paper of the European Commission of 16 November 1993 on consumer access to justice and resolution of consumer disputes in the single market, COM (93) 576; The action plan of the European Commission of 14 February 1996 on facilitating the access of consumers to justice and the settlement of consumer disputes in the internal market, COM (96) 13; EC Communication of 30 March 1998 on alternative dispute resolution, COM (98) 198; Green Paper of the European Commission of 19 April 2002 on alternative dispute resolution in the fields of civil and commercial law, COM (2002) 196.

[28] The situation changed in 2009 after the EU institutions were granted greater powers in the field of judicial cooperation in civil matters, under the Treaty of Lisbon. According to art. 81 (2) of the consolidated version of the Treaty on the Functioning of the European Union (Official Journal of the European Union 2008 C 115/47, hereinafter: TFEU): "The European Parliament and the Council adopt measures to, among others, ensure effective access to justice and the development of alternative methods of dispute resolution". Under this article, the EU may adopt measures for the approximation of the laws and secondary legislation of the Member States in the field of ADR.

p. 13). The first of them, Recommendation 98/257/EEC issued in 1998, related to the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes[29]. The second, Recommendation 2001/310/EC of 2001, introduced the rules on out-of-court bodies involved in the amicable resolution of consumer disputes[30]. Ultimately, however, the European legislator decided to introduce a completely new directive to the legal order, namely Directive 2013/11/EU on ADR and the Regulation 524/2013 on ODR. The above EU achievements remain complementary to the regulations of the ADR Directive and the ODR Regulation, and the individual provisions of these acts must be interpreted in the light of the existing achievements of European Union law. Recital 19 of the preamble of the Directive on consumer ADR introduces, in addition, the primacy of this Directive in relation to other acts addressing alternative methods of dispute resolution, by stating that when two norms are in conflict, the Directive shall prevail, unless expressly provided otherwise.

4. Lack of Implementation of the Directive on Consumer ADR within the Prescribed Period – the Legal Consequences

Transposition is a crucial step in the introduction of a directive into national law and the subsequent condition of effectiveness of these regulations. The EU legislation in no way imposes the form or method of implementation, which is only limited by the aim of the directive[31]. The process of the implementation of the directive into the national legal system and its regularity is very crucial[32]. Indeed, until the transposition and before the expiry of the term to carry it out, the directive as an act of the EU does not have the feature of the direct applicability in the legal systems of the Member States[33]. In the case of the Directive on ADR in consumer issues, the deadline to transpose the provisions is set out in art. 25 paragraph 1, where the Member States, including Poland, were required

[29] Recommendation of the European Commission 98/257/EC.

[30] Recommendation of the European Commission 2001/310/EC.

[31] The condition for the effective application of the norms of the European Union directive in national law of the Member State is its implementation. According to art. 288 paragraph 3 of the TFEU, the act of binding the Member States by the objective of the directive and leaving to them flexibility in the choice of instruments to achieve it, is the basic premise of the structure of the EU law sources.

[32] See (Lenaerts & Van Nuffel 2011, pp. 901–906).

[33] See the ECJ judgment of 5 April 1979 – *Pubblico Ministero vs Tullio Ratti*, Ref. 148/78 (Lenaerts & Van Nuffel 2011, p. 897).

to adopt and implement the statutory provisions, the secondary legislation or the administrative provisions in the period up to 9 July 2015.

In accordance with the principle of a direct effect of EU law, a failure to implement of the Directive in a timely manner may constitute the basis for individuals to invoke the provisions of the directives as the source of their rights in proceedings before the courts of Member States[34]. However, the mere breach of the duty to implement the Directive is not a sufficient condition for the occurrence of direct effect[35]. CJEU formulated such additional terms and conditions in its judgment in *Ursula Becker vs Finanzamt Münster-Innenstadt*[36]. In light of this ruling, the condition of the direct effect of specific provisions of Directive 2013/11/EU – in addition to the defective implementation itself – is so-called "sufficient precision and unconditionality" of such provisions and the creation by these provisions of the law on which individuals may rely. Therefore, in order to state that the consumer could effectively rely on Poland's failure to implement in proper time Directive 2013/11/EU, it must first be examined whether the provision on which the consumer bases his or her demand is unconditional and sufficiently precise. In this regard, to the extent that Directive 2013/11/EU requires the Member States to establish a coherent and complete system of ADR entities and to guarantee consumers ADR procedures of adequate quality, it does not use the so-called "leeway of decision", which means that the Directive is in this regard sufficiently precise and unconditional[37]. The latter condition, i.e. conferring to

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[34] See ECJ judgment of 11 July 2002 – *Marks & Spencer plc vs Commissioners of Customs & Excise* (case no C-62/00); judgment of 26 February 1986 – *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority* (case no 152/84); judgment of 19 January 1982 – *Ursula Becker vs Finanzamt Münster–Innenstadt* (case no 8/81).

[35] ECJ judgment of 22 May 2003 – *Connect Austria Gesellschaft für Telekommunikation GmbH vs Telekom-Control-Kommission* (case no C-462/99).

[36] In paragraph 25 of the judgment 8/81, the ECJ held, *inter alia*: "(…) in any case where the provisions of the Directive seem to be, as to their subject matter, unconditional and sufficiently precise and implementing provisions have not been adopted within the prescribed period, the provisions of the Directive may be relied upon in connection with any national rule incompatible with the Directive, or in the extent to which the provisions of the Directive define the rights of individuals in cases against the Member State".

[37] In its judgment of 18 October 2001 on *Riksskatteverket vs Soghra Gharehveran* (case no C-441/99) the ECJ stated: "Just like a private person should be able to rely on the right which is vested with him or her on the basis of precise and unconditional provision of the directive, if such a provision is severable from the other provisions of the same directive, not having the same level of precision or unconditionality, this person should be able to rely on the provisions conferring on him or her in a precise and unconditional way the status of a beneficiary of the directive if only the discretion left to the Member State in relation to the other provisions of the directive, whose non-implementation was the only obstacle to the effective exercise of the rights granted to a private person by the directive, has been fully utilized".

the individuals the rights in the directive, in fact, determines the extent of the occurrence of a direct effect. In this regard, it is necessary to subject the respective provisions of the directive to a thorough analysis.

In examining the question of the legal consequences of the failure to implement Directive 2013/11/EU within the prescribed period (before 10 January 2017), two important questions arise: whether in the situation of the lack of implementation in proper time of the provisions of the directive, can the consumer rely directly on the rules of the directive and claim damages against Poland arising from the non-implementation of Directive 2013/11/EU within the prescribed time (what is known as a vertical claim), and whether the consumer would be able, in the light of existing rules and the adopted case law of the CJEU to effectively demand from a given trader the payment of compensation due to non-implementation of certain obligations under the Directive 2013/11/EU. An example of such an obligation is the obligation to provide information on the applicable ADR procedures (a horizontal claim).

In this case, the failure to implement the provisions of Directive 2013/11/EU to the Polish legal system in a timely manner renders the Directive less effective and, consequently, deprived consumers – from 9 July 2015 to 10 January 2017 – of the rights the Directive conferred on them. The issue of the liability of the state vis-à-vis the individual for a breach of EU law was determined by the CJEU in its judgment of 19 November 1991 in the joint cases C-6/90 and C-9/90 – *Andrea Francovich, Danila Bonifaci and others v Italy*[38]. In the light of these rulings, a Member State which has violated the obligation of implementation cannot, in a case against individuals, rely on the failure of its obligations under the Directive. Moreover, in each case when the provisions of the directive are, in terms of their content, unconditional and sufficiently precise, in the absence of the secondary legislation being issued within the prescribed period, it is possible to rely on such provisions against any national rules that are incompatible with the Directive, and also in the event when they define the rights which individuals may rely upon against the state[39]. However, the Member State is not liable for any infringement of law, only for an eligible violation which is sufficiently serious[40]. Accordingly, three conditions must be fulfilled in order to deem that

[38] The case arose against the background of Directive 80/987, which aimed at providing employees a Community minimum of protection in the event of insolvency of their employer. The Italian Republic failed to implement the statutory provisions, the secondary legislation and the administrative provisions necessary to comply with the directive within a period which expired on 23 October 1983.

[39] See: judgment of 19 January 1982 in the case no 8/81 *Becker Rec*. p. 53, point 24 and 25.

[40] The CJEU has formulated the following guidelines to assess the seriousness of an infringement: (1) the national court should take into account the clarity and the precision of the

the individuals have the right to compensation for damages directly on the basis of EU law. First, the result intended by the Directive should include granting to individuals certain rights. Second, it should be possible to determine the content of those rights on the basis of the provisions of the Directive. Third, there should be a direct causal link between the breach of the obligation incumbent on the Member State and the damage sustained by the injured parties[41].

It should be now considered whether a hypothetical liability of Poland vis-à-vis a particular consumer could arise in case of errors in the implementation of the Directive 2013/11/EU. As regards the first condition, many provisions of the Directive confer a number of rights aimed at protecting the interests of the consumers and specify in detail the scope of such powers[42]. A failure to implement these provisions in line with the objective set out in the directive into the national law may be a reason to limit the consumers' access to information which is essential from the point of view of the decisions related to concluding particular transactions. Therefore, in such a case, the first of the conditions would be fulfilled. The second premise, namely as concerns the direct causal link between the failure to implement Directive 2013/11/EU and damage to

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rule infringed, and if the EU law gives to the Member States certain discretion, the key issue is how seriously and significantly the limits of the discretion have been exceeded; (2) to deem a certain breach serious, it is not necessary for the Member State to act with intended fault or negligence; (3) there is no need for an early recognition by the CJEU that there has been a failure by a Member State of its obligations under the Treaty; (4) the manifestation of a serious breach of EU law is a failure to issue an act of law which ensures the effectiveness of the provisions of the directive in the national legal order; (5) the manifestation of a serious breach is a situation in which a Member State does not take any measures necessary to achieve the result envisaged by the directive within the prescribed time. See: paragraphs 27–28 of the ECJ judgment of 8 October 1996 – *Dillenkofer and others vs Federal Republic of Germany*, case no C-178/94 and paragraphs 36–41 of the ECJ judgment of 18 January 2001 – *Sweden vs Stockholm Lindöpark AB and Stockholm Lindöpark AB vs Sweden*, case no C-150/99.

[41] Remedying the damage caused by the Member State should take place within the framework of the national tort law. In addition, the substantive and the formal conditions in terms of remedying the damage, as defined in the legislation of the individual countries, cannot be less favourable than those governing similar domestic claims and they must not be determined in a manner that causes the compensation to be practically impossible or excessively difficult to obtain. See paragraphs 67–73 of the ECJ judgment of 5 March 1996 – *Brasserie du Pêcheur SA vs Federal Republic of Germany*, case no C-46/93.

[42] In particular art. 2 paragraph 3 (quality requirements), art. 5 paragraphs 1–7 (availability of ADR entities and of ADR procedures), art. 7 paragraphs 1–2 (transparency), art. 8 (effectiveness), art. 9 paragraphs 1–3 (fair treatment), art. 10 paragraphs 1–2 (voluntariness), art. 11 paragraph 1 (legality), art. 12 paragraph 1 (impact on limitation period), art. 13 paragraphs 1–3 (traders' obligations to provide information), art. 14 paragraphs 1–2 (assistance provided to consumers), art. 15 paragraphs 1–4 (disclosure requirements of ADR entities), art. 18 paragraph 1 (appointment of competent authority).

the consumer, should be examined each time in the specific facts of the case. However, the damage in such a case will cover both the actual financial loss (*damnum emergens*) as well as lost benefits (*lucrum cesans*). Undoubtedly, the lack of implementation of Directive 2013/11/EU within the prescribed period – from 9 July 2015 to 10 January 2017 – may result in the consumer being deprived of or being restricted in his rights vis-à-vis the entrepreneur, which can, in turn, inflict a measurable loss or damage, e.g. due to the lack of the possibility to use fast, low-cost out-of-court means of pursuing one's consumer rights and the need to incur additional costs associated with prolonged litigation. In this case, Poland could be required to remedy the damage caused to the consumer by its failure to implement Directive 2013/11/EU, but only if particular damages were caused between 9 July 2015 and 10 January 2017.

The horizontal effect of the directive is a bit more problematic[43]. The Court in principle rejects the horizontal direct effect of directives[44], i.e. referring to the relationship between the individuals themselves, namely the possibility of pursuing the rights due to one individual to another individual on the basis of the provision of the directive. However, this opinion is criticised by some representatives of the doctrine[45]. The above opinion has been made clear by the Court in the case of *Paola Faccini Dori vs Recreb Srl*. The ECJ stated there that: "a directive is binding only in relation to each Member State to which it is addressed and has been established in order to prevent a State from taking advantage of its own failure to comply with Community law. It would be unacceptable if a State, when required by Community legislature to adopt certain rules intended to govern the State's relations or those of State entities with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefit of those rights. The effect of extending that principle to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations. It follows that, in the absence of measures of transposition

[43] The vertical effect of the directives is clearly indicated in the jurisprudence of the ECJ. In its judgment of 26 February 1986 – *M. H. Marshall vs Southampton and South-West Hampshire Area Health Authority* (case no 152/84) the ECJ stated: "With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to article 189 of the EEC Treaty, the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to «each Member State to which it is addressed». It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person".

[44] The ECJ judgment of 4 December 1997 – *Verband deutscher Daihatsu-Händler eV vs Daihatsu Deutschland GmbH* (case no C-97/96).

[45] See (Biernat 2006, pp. 285–286).

within the prescribed time-limit, an individual may not rely on a directive in order to claim a right against another individual and enforce such a right in a national court"[46]. Therefore, it should be assumed that, in general, consumers will not be able to rely on the provisions of Directive 2013/11/EU against the trader; and hence they will not be able to effectively assert their rights before a national court against a trader who has failed to respect its obligations under the Directive. Note, however, that in the light of several judgments[47], the CJEU has allowed for an incidental occurrence of the horizontal effect, even if, in the light of Directive 2013/11/EU, the cases referred to in these rulings will not apply.

Despite the lack of horizontal effect of the Directive, the failure to implement Directive 2013/11/EU before 10 January 2017 brings down specific legal consequences in private law relations between consumers and entrepreneurs. In its rulings, the CJEU has formulated principles which amount to guidelines addressed to the national courts as to how they should proceed when improper implementation of a directive is found[48]. These principles should be applied accordingly also when there has been a failure to implement Directive 2013/11/EU within the prescribed period. The following three measures should be taken. First, the national courts should, in case of disputes on the basis of a failure to properly implement the Directive on consumer ADR till 10 January 2017, interpret the national law in the most consistent manner with the Directive. That is, they should apply such an interpretation which ensures that the objectives envisaged by the Directive are reached as fully as possible[49]. Second, in the event of a conflict with the national law, in a situation in which the result prescribed by the Directive cannot be achieved, the Member States should make amends for the damage incurred by the individuals due to errors in the transposition of the Directive, on condition of the fulfillment of other premises in case of incurring such damage. Third, when necessary, the national court should address the CJEU with a request

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[46] The ECJ judgment of 14 July 1994 – *Paola Faccini Dori vs Recreb Srl* (case no C-91/92).

[47] See the ECJ judgment of 30 April 1996 – *CIA Security International SA vs Signalson SA and Securitel SPRL* (case no C-194/94); the ECJ judgment of 28 January 1999 – *Österreichische Unilever GmbH vs Smithkline Beecham Markenartikel GmbH* (case no C-77/1997).

[48] See (Szpunar 2004, p. 57).

[49] This is referred to as "pro-EU" interpretation of national law, which, however, is subject to restrictions – it may not impose on national courts the duty of interpretation which is contrary to law. It also is limited by the general principles of law which form part of EU law, including the principles of legal certainty and non-retroactivity of law. Cf. also the ECJ judgment of 10 April 1984 – *Sabine von Colson and Elisabeth Kamann vs Land Nordrhein-Westfalen* (case no 14/83); the ECJ judgment of 8 October 1987 – *Kolpinghuis Nijmegen BV* (case no 80/86) and the ECJ judgment of 15 April 2008 – *Impact vs Minister for Agriculture and Food, and Others* (case no C-268/06).

for a preliminary ruling on the interpretation of the Directive in accordance with art. 267 TFEU[50].

5. Conclusions

The work done by the European Union on guaranteeing consumers an adequate quality of alternative dispute resolution shows that this issue is of utmost importance for the proper functioning of the internal market. Unfortunately, Poland did not comply with the deadline of Directive's implementation and pass proper law until 10 January 2017, which was considerably beyond the prescribed implementation period[51]. The failure to transpose this Directive[52] within the prescribed period was important for several reasons[53]. First, after additional conditions have occurred, Directive 2013/11/EU becomes directly applicable on the strength of the principle of direct effect. Second, due to the occurrence of the direct effect of directives, the rights of individuals (consumers) arise, resulting from the directive itself, which can be enforced by those individuals before the national courts. Third, the doctrine of compensatory liability lays down the right

[50] It should be emphasised that addressing the CJEU for a preliminary ruling is not the court's duty but a right. Moreover, this right should not be a reason to withdraw from the particular procedures, which should be respected by the court under the domestic law when withdrawing from the application of the national provision which it considers contrary to the Constitution. For more on this topic, see paragraphs 53–56: the ECJ judgment of 19 January 2010 – *Seda Kücükdeveci vs Swedex GmbH & Co. KG KG* (case no C-555/07).

[51] The legal consequences of a failure to implement may apply to the State Treasury as well as private entities – natural and legal persons, entrepreneurs, consumers and ADR entities.

[52] According to the ECJ judgment of 12 July 2005 – the *EC Commission vs France* (case no C-304/02): Defectiveness of the implementation can consist in: a complete lack of or a delay of the implementation, which, in turn, makes the directive ineffective because the goals it assumes cannot be achieved; a partial lack of implementation of a directive (incomplete implementation) due to a failure to regulate all the issues required by the provisions of the directive; incompatibility of the provisions of the national law with the provisions of a directive or treaty; ineffective implementation of a directive due to the lack of effectiveness of its norms on the territory of a Member State that results from the inability to ensure compliance with the implemented provisions in the internal (domestic) act of law.

[53] According to the ECJ judgment of 11 April 1978 – the *EC Commission vs the Italian Republic* (case no 100/77), also before the deadline for the transposition of a directive, the Member States are obliged to refrain from actions which could cause the implementation of its objectives to fail, which follows from the interpretation of art. 4 paragraph 3 passage 2 of the Treaty on European Union and art. 288 passage 3 of TFEU. Moreover, the Member State, in the event of non-compliance with the deadline for the transposition of a directive (as well as in the event of a failure to comply with implementation duty) may not cite internal difficulties or national internal rules, or even the specifics of its constitutional system, to justify the delay.

to claim compensation from a Member State (Mik 2000, p. 500). This means, in spite of the late implementation of the Directive, that consumers in Poland are indirectly protected by the possibility of claiming compensation from the Member State for damage suffered. This partial compensation of consumer damage is the direct result of EU case law. Without such a mechanism of consumer protection, each consumer in a given Member State would lack protection and be exposed to unfair practices on the part of the state.

In Poland, despite the progress that has been made, the mechanisms of amicable settlement of disputes remain underdeveloped, uncommon and unknown among the consumers. Practice nonetheless shows that out-of-court dispute settlement is an effective and inexpensive method by which consumers may assert their rights. This applies especially to petty cases which, when settled by the courts of law, have a number of drawbacks, such as excessive length of proceedings, high costs, formalised procedures, etc. The proper implementation of Directive 2013/11/EU has now begun to bring about effective protection of consumer rights in Poland. The country should strive in the future to provide consumers with the widest possible access to ADR resources, helping swing the pendulum from theoretical rights to factual ones. It is also important to encourage and inform consumers about the use of cheaper and faster methods of enforcing their rights. A consumer who feels aversion to ADR will always be willing to choose a common court despite its manifold drawbacks. Such behaviour is attributable mainly to a lack of trust in ADR. Building trust in ADR entities is a priority for Poland to support the development of ADR methods among consumers in the near future.

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Implementacja dyrektywy 2013/11/UE w sprawie alternatywnych metod rozstrzygania sporów konsumenckich – rys historyczny oraz konsekwencje prawne braku transpozycji w terminie

(Streszczenie)

Celem artykułu jest przeprowadzenie analizy prawnej procesu implementacji dyrektywy 2013/11/UE do polskiego porządku prawnego oraz przedstawienie konsekwencji prawnych braku transpozycji dyrektywy w terminie. W pierwszej części autor prezentuje rys historyczny prac na poziomie Unii Eurpejskiej nad alternatywnymi sposobami rozwiązywania sporów konsumenckich oraz dokonuje oceny propozycji określonych rozwiązań prawnych przedstawianych w toku tych prac. Następnie przedstawione są główne problemy i wyzwania związane z procesem transpozycji postanowień dyrektywy 2013/11/UE. W szczególności prowadzone są rozważania na temat bezpośredniej skuteczności dyrektywy 2013/11/UE w ujęciu wertykalnym oraz horyzontalnym. Autor dochodzi do wniosku, że brak terminowej implementacji dyrektywy w sprawie konsumenckiego ADR aktualizuje odpowiedzialność odszkodowawczą państwa w stosunku do jednostki za szkodę wyrządzoną brakiem implementacji oraz nakłada na sądy krajowe obowiązek stosowania tzw. prounijnej wykładani prawa krajowego. Natomiast w świetle ugruntowanego orzecznictwa TSUE oraz mając na uwadze charakter przedmiotowej dyrektywy, brak prawidłowej implementacji dyrektywy 2013/11/UE w terminie nie uprawnia konsumenta do skutecznego dochodzenia swoich praw przeciwko przedsiębiorcy z tytułu braku realizacji obowiązków płynących z dyrektywy.

Słowa kluczowe: konsument, ADR, dyrektywa, implementacja, bezpośredni skutek.

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