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Unlawful provisions of a contract (abusive clauses) – forms of review and the system of eliminating them from economic trading

Abstract

As a rule, legal transactions are governed under the principle of the freedom of contract, though this does not mean that each provision included in a contract will be lawful, especially if a consumer is one of the parties to the contractual relationship. The legislator, whose aim is to equate the positions of the undertaking and the consumer, introduces a number of regulations addressing the inclusion of abusive clauses in a contract/standard contract. The paper discusses the definition of unlawful provisions correlated with forms of reviewing them with reference to amendments introduced in this scope.

Key words:

consumer, abusive clauses, abstract review, incidental review

Introduction

Unlawful contractual provisions, in other words abusive clauses, the need to regulate which under Polish law resulted from the obligation to implement Council Directive 93/13/EEC¹ of 5 April 1993 on unfair terms in consumer contracts,² are regulated by Articles 385¹–385³ of the Act of 23 April 1964 The Civil Code³ (hereinafter CC). As rightly noted in the judicature, these regulations are “the core of the system of consumer protection against undertakings’ using their stronger contractual position associated with the possibility of unilateral shaping the contents of provisions binding the parties, in order to reserve clauses unfavourable to the consumer (abusive clauses)”.⁴ It needs

1 See more in: I. Szczepańska-Kulik, *Nowy model abstrakcyjnej kontroli wzorców umów*, “Edukacja Prawnicza”, 2017, no. 2.

2 See more in: K. Skubisz-Kępa, *Komentarz do art. 385¹ KC*, in: *Kodeks cywilny. Komentarz*, M. Habdas, M. Frasz (eds.), Warsaw 2018, LEX, point 1.

3 Consolidated text, Dz. U. (Journal of Laws) of 2019, item 1145.

4 See Resolution of the seven judges of the Supreme Court of 20.06.2018, III CZP 29/17, <http://www.sn.pl>.

to be highlighted that these regulations introduce an instrument of enhanced⁵ “review of the content of provisions imposed by an undertaking with regard to respecting consumer interests”.⁶

It needs to be highlighted already here that the discussed regulations refer only to relationships occurring between consumers and undertakings which are referred to as B2C (business-to-consumer). These regulations, however, are not ignored in commercial transactions (B2B, business-to-business), as they directly affect them.

The fundamental purpose of this study is to analyse and assess the changes in the system of review of provisions of standard contracts executed with consumers by entrusting it to the President of the Office of Competition and Consumer Protection (hereinafter the Office), maintaining substantive review over its decisions by the Court of Competition and Consumer Protection.

Consumer as a party to a contractual relationship

It is worth beginning reflections on the subject-matter of abusive clauses and forms of their review by presenting the legal specificity of the position of the consumer in relation to the undertaking.

In legal trading the consumer is seen as a weaker party to the contractual relationship.⁷ This position is particularly justified under Article 76 of the Constitution of the Republic of Poland⁸ and the established line of decisions of the Constitutional Tribunal,⁹ and should not raise great doubts. Despite that, it is worth recalling arguments supporting it. It is known that in order for a natural person to be attributed the status of a consumer they must perform a legal act with an undertaking, but this activity must not be directly related to his business or professional activity (Article 22¹ CC). With reference to the said definition the following model is construed: a non-professional entity – consumer, executes a contract (or performs another legal acts) with a professional entity – an undertaking. Already at this level of analysis, when defining the parties, a clear disproportion can be seen – only one of the entities

5 Enhanced in terms of general principles specified in Article 58 § 2, Article 353¹ and 388 CC.

6 See resolution of the seven judges of the Supreme Court of 20.06.2018, III CZP 29/17, <http://www.sn.pl>.

7 Cf. A. Grzesiek, *Niedozwolone klauzule w umowach o imprezę turystyczną we wspólnotowym i polskim prawie ochrony konsumenta*, Cracow 2008, pp. 26–28. The author presents a definition of a consumer against European law taking into account his weaker position in the relationship with an undertaking.

8 Pursuant to the said article, public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices and the scope of such protection shall be specified by statute. See Article 76 of the Constitution of the Republic of Poland of 2 April 1997 (Dz. U. (Journal of Laws) no 78 item 483).

9 As noticed by the Constitutional Tribunal, “the legislator considered it certain that the consumer is a weaker party to a legal relationship and thus requires protection, that is certain rights which would lead at least to relative equation of the position of counterparties. Consumer’s rights correspond to certain obligations from the other side – seller or service-provider. Whereas jointly the rights of one and the obligations of the other party are to compensate the consumer his incomplete possibility to exercise the principle of autonomy of will of the parties to the contract” and further – “protective obligations resting on public authorities cover the need to ensure minimum statutory guarantees to all entities, who (...) take a weaker position in relation to professional participants of the market game”. See judgment of the Constitutional Tribunal of 02.12.2008, K 37/07, OTK-A 2008/10/172, Dz. U. (Journal of Laws) 2008/219/1408, LEX no. 465366.

listed in Article 22¹ CC should be attributed the name of a professional entity; naturally, the undertaking. Therefore, one cannot place the equals sign between the undertaking and the consumer looking through the prism of a legal act which may bind the parties in the future. This results from the fact that in a majority of cases the consumer does not have, or even does not have the opportunity to gain such professional knowledge on a given product or service that the undertaking has. Consumer's position to a large extent depends on the behaviour of the undertaking. Information passed to him by e.g. a salesperson will have great impact on his decisions. Continuing the reflections – the fact that the consumer does not have the same specialist knowledge in terms of the good or service as the undertaking does is not the only premise that advocates considering the consumer a weaker party. At the moment of executing a contract with an undertaking, most often this contract has already been drawn up and the only thing that individualises it is the parties' data; this then means incorporation of a standard contract. It is the professional entity that creates the legal relationship. On the ground of the above comments the legitimacy of consumer protection seems natural. However, it is worth noting as in E. Łętkowska, that this protection should not be seen as the authority's protectionist favouring the consumer, but as actions for compensating his lack of knowledge and awareness caused by the mass scale of production and trading in general. Measures and instruments serving to protect the consumer, concludes E. Łętkowska, do not aim to "give" the consumer something extra, but to restore equality of opportunity, hence consumer protection means "an instrument of fighting for a truly free market – for all its participants, active and passive".¹⁰ K. Zaradkiewicz has a similar view on this matter indicating, that the legislator's introducing various forms of consumer protection and calling him "a weaker party" does not aim to favour him in relations with a professional entity but to execute the principle of equality of the parties in real terms.¹¹

Premises for abusiveness

In order to protect consumers as weaker parties in the relations with undertakings, the legislator has introduced a security measure for consumer interests – an institution that allows considering some of contract provisions occurring in consumer transactions as unlawful.

Under Article 385¹ § 1 CC unlawful clauses need to be understood as such provisions of a contract which have not been agreed individually and at the same time set forth his rights in contrary to good practice, grossly violating consumer's interests. At the same time, it must be noted that this does not apply to all contractual provisions – it does not refer to provisions shaping the parties' main performances.¹² The legislator clarified here that it involves mainly the price or remuneration, as long as these provisions were expressed in the contract in a way

¹⁰ See E. Łętkowska, *Prawo umów konsumenckich*, Warsaw 1999, p. 19.

¹¹ K. Zaradkiewicz, *Rozważania ogólnosystemowe. Wolność "słabszego" do samookreślenia gospodarczego w świetle art. 76 Konstytucji RP*, in: *Ochrona strony słabszej stosunku prawnego*, M. Boratyńska (ed.), Warsaw 2016, LEX.

¹² It needs to be expressly highlighted that where a given provision meets all premises of abusiveness but was individually agreed with the consumer then it cannot be called unlawful. See more in: M. Michońska, *Pacjent jako konsument świadczeń zdrowotnych. Klauzule niedozwolone w umowach o świadczenie usług medycznych*, in: *Prawa konsumenta w teorii i praktyce*, M. Frasz, (ed.), Warsaw 2018, point V.

that does not raise doubt. It needs to be flagged up that the regulation of Article 385¹ CC does not only refer to individual contracts but also to standard contracts referred to in Article 384 CC.¹³

In order to move on to discussing forms of reviewing unlawful clauses positive premises that must be met in order for a given provision to be called abusive must be analysed. Following Article 385¹ CC's regulations in order all features of abusiveness of contractual provisions will be discussed.

Firstly, one needs to respond to the question of the statutory phrase that “a provision has not been agreed individually with the consumer”. Article 385¹ § 3 CC addresses it saying that provisions which are not agreed individually are those on which the consumer had no actual influence. Then, how should “actual influence” be understood? The Court of Appeal in Białystok among others addressed this expressing a view that the mere fact of the consumer being aware of the content of the provision and, what is more, understanding its meaning does not necessarily preclude that it has been individually agreed with him.¹⁴ The court's position is well-worth approving as the very fact of being aware of something does not equate with having actual influence on a given state of affairs. Legal scholars and commentators express a view according to which it is impossible to conclude that the consumer had actual influence on a given provision if he only had the possibility to choose between a few solutions offered by the undertaking. Actual influence can thus be talked about e.g. where the consumer himself suggested a given provision of a contract and it was accepted by the undertaking.¹⁵ Article 384 CC is worth mentioning here which talks about standard contracts. Should in a given individual contract provisions of a standard contract be included it needs to be considered by default that the consumer did not have influence on such provisions.¹⁶

Secondly, another premise of abusiveness involves “setting forth consumer's rights and obligations in a way that is contrary to good practice”. It is difficult to find a legal definition of “good practice”, yet based on a firm stand of legal scholars and commentators and the established line of judicial decisions it needs to be concluded that provisions contrary to good practice will be those that mislead the consumer or those that set forth consumer's position with violation of the principle of freedom of contract.¹⁷ The Supreme Court in one of its judgments also stated that it is contrary to good practice to formulate contractual provisions in such a way that gives the professional entity freedom to set the extent of parties' obligations during the duration of the legal relationship or to exchange the product named in the contract with a similar product though in essence different to the one specified in the contract.¹⁸

The last of the determinants of abusiveness involves “violating consumer's interests”. Any provision that causes an unfounded and unfavourable to consumer disproportion between his rights and obligations and the rights and obligations of the undertaking constitutes a gross

13 W. Popiołek, *Komentarz do art. 385¹ KC*, in: *Kodeks cywilny. Komentarz*, K. Pietrzykowski (ed.), Vol. I, Warsaw 2018, p. 1293.

14 Judgment of the Court of Appeal in Białystok of 8 August 2019, I ACa 79/19, LEX no. 2726793.

15 K. Skubisz-Kępa, *Komentarz...*, point 5.

16 See judgment of the District Court for Warszawa-Śródmieście in Warsaw of 29 April 2016, VIC 1713/15, LEX no. 2045180.

17 J. Mojak, *Dobre obyczaje w polskim prawie kontraktowym – wybrane zagadnienia*, “*Studia Iuridica Lublinensia*” 2016, no. 2, p. 172.

18 Judgment of the Supreme Court of 27 February 2019, II CSK 19/18, LEX no. 2626330.

violation of the interests of the weaker party to the relationship.¹⁹

Considering a given contractual provision as abusive, pursuant to Article 385¹ § 2 CC, results in the fact that parties are not bound by such a provision under the law *ex tunc*. However, a contract is binding on the parties in the remaining scope. The Supreme Court pointed to two possibilities of solutions in the case of occurrence of abusive clauses in a contract. One of them is deciding that after excluding abusive clauses the contract is binding on the parties in the remaining scope. The other one involves deciding about the contract's nullity or declaring a contract null and void due to the lack of possibility to execute it by the parties as a result of exclusion of abusive clauses.²⁰

Moving on to forms of reviewing abusive clauses it is worth mentioning the catalogue of abusive clauses included in Article 385³ CC. The article in question constitutes a set of 23 sample provisions that need to be considered unlawful.²¹ The catalogue of abusive clauses is related to the regulations expressed in Article 385¹ CC; thus one needs to agree with the position of the Supreme Court which says that where a given provision is identical to one named in the catalogue it constitutes at the same time violation of provisions expressed in Article 385¹ CC. The mere fact that a given provision of a contract or a standard contract is similar to the one included in the catalogue does not deem the provision abusive. According to the Supreme Court, this catalogue should provide support where there are doubts as to the fact whether a given provision should be considered unlawful or not.²² Clauses included in Article 385³ CC are referred to by legal scholars and commentators as the so-called grey clauses; the purpose of this institution is to create a potential possibility to maintain provisions convergent with the catalogue, though in practice it is quite unlikely.²³

Placing definitions of clauses in regulations and creating a sample catalogue alone does not provide consumers with full protection. This is why two forms of reviewing abusive clauses have been introduced into the Polish legal order.

Forms of reviewing abusive clauses

The Polish legal system distinguishes between incidental and abstract reviews of abusive clauses.

Reviewing abusive clauses of incidental/specific nature does not refer directly to a standard contract but to a given specific legal relationship. This is a matter of establishing a contractual obligation between the consumer and the undertaking. The Court of Appeal in Warsaw presented the core of incidental review of abusive clauses clearly in its judgement stating that the essence of a specific review of provisions of a contract in terms of abusiveness involves protection of a specific consumer. The court examines then the provision of a given contract, where-

19 See judgment of the Court of Appeal in Warsaw of 1 July 2019, V ACa 492/18, LEX no. 2706990.

20 More in judgement of the Supreme Court of 29 October 2019, IV CSK 309/18, LEX no. 2732285.

21 W. Madej, *Klauzule abuzywne w polskim prawie cywilnym*, "Kortowski Przegląd Prawniczy" 2017, no. 2, p. 37.

22 Judgment of the Supreme Court of 12 February 2013, V Ca 3013/12, LEX no. 1994342.

23 G. Karaszewski, *Komentarz do art. 385³ KC*. in: *Kodeks cywilny. Komentarz.*, J. Ciszewski, P. Nazaruk (eds.), Warsaw 2019, LEX, point 1.

as if the contract includes provisions of a standard contract, then it is also subject to review.²⁴ Therefore, a conclusion needs to be made that incidental review may cover only such provisions of a contract which were not individually agreed with the consumer, or those which the undertaking imposed on the consumer, maintaining, naturally, the remaining premises under Article 385¹ CC. Only the consumer and undertaking bound by a specific contractual relationship may be parties to court proceedings in the course of which incidental review is carried out. Therefore, a ruling on the abusiveness of given provisions is binding *inter pares*.²⁵ As for the subject-matter of incidental review, as mentioned earlier, it covers provisions of a contract which were not individually agreed with the consumer. If a specific contract was drafted by means of a standard contract, then the provisions of this standard contract also become subject to review. Certain doubts arise in terms of reviewing the standard contract itself during incidental review. What where a consumer claims abusiveness of only one provision of a standard contract incorporated to the contract, the court decides about this abusiveness and then the consumer brings another action to court concerning abusiveness of the entire contract due to bad incorporation of the standard contract? M. Bednarek asks a legitimate question here – how should the court respond to this and how does it refer to Article 321 of the act of 17 November 1964 The Code of Civil Procedure²⁶ (hereinafter CCP)? It is well-founded to express approval for the view presented by M. Bednarek in reference to the above – where the contract binding the parties was incorporated from a standard contract, the court should examine *ex officio* the correctness of such incorporation.²⁷

With regard to incidental review, it needs to be emphasised that it is carried out in each proceeding if the party (consumer) puts forward an allegation of including an unlawful clause in a given contract. Continuing reflections in this regard it needs to be stated that court proceedings may involve incidental review even if it was the undertaking, not the consumer, who was the claimant.²⁸ It is indeed possible that an undertaking should bring an action against a consumer and in the course of the proceedings the consumer puts forward a plea of including an unlawful clause in the contract binding the parties. The court will then review the contract. It needs to be highlighted here that the judgment in the case will not set forth a new legal situation for the parties; therefore, it will have a declarative character.²⁹ This results from the fact that an unlawful clause is invalid from the very beginning and the court's tasks involves examining only whether a given provision does or does not bear features of abusiveness. Therefore, it is not the court's competence to put provisions the court deems appropriate in place of abusive provisions.³⁰ This would entail violation of the freedom of con-

24 Judgment of the Court of Appeal in Warsaw of 13 March 2017, VI ACa 1866/15, LEX no. 2423350.

25 M. Bednarek, *Sądowa kontrola w obrocie konsumenckim*, in: *Prawo zobowiązań – część ogólna*. E. Łętkowska (ed.), Vol. 5, Warsaw 2013, pp. 792–795.

26 Consolidated text, Dz. U. (Journal of Laws) of 2019, item 1460 as amended.

27 K. Zagrobelny, *Związanie wzorcem, konsument. Komentarz do art. 385¹ KC*, in: *Kodeks cywilny. Komentarz*, E. Gniewek, P. Machnikowski (eds.), Warsaw 2017, p. 695.

28 Judgment of the Regional Court in Wrocław of 20 March 2014, II Ca 1501/13, LEX no. 1994277.

29 K. Zagrobelny, *op cit*.

30 Cf. M. Romanowski, *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe*, in: *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa Trybunału Sprawiedliwości UE*, M. Romanowski (ed.), Warsaw 2017, pp. 7–9. The author points out possible decisions in the event of deeming a given contractual provision unlawful.

tract, a view supported by the European Court of Justice (hereinafter ECJ).^{31 32} The Supreme Court expressed its opinion on the above in the same way, pointing out that when assessing abusiveness of a given provision the court does not consider how a given provision should be amended and whether such a change should take place at all.³³

Naturally, when evaluating the provisions, the court takes into account the moment the contract was executed.³⁴ What occurred after the contract had been signed should not be taken into account when assessing abusiveness.³⁵ When assessing the provisions of the contract the court should examine not only the contract itself but also connected contracts, which results directly from Article 385² CC.

Summing up the reflections on incidental review of abusive clauses one needs to agree with B. Wyżykowski who states that in order to decide about abusiveness of provisions of a given contract a specific legal relationship needs to be assessed and not the mere fact of deeming a similar provision in the past unlawful.³⁶

In turn, abstract review of abusive clauses, contrary to incidental review, does not refer to a specific legal relationship but to reviewing the standard contract (definition of a standard contract – Article 354 CC).³⁷ For this form of review it does not matter whether a given standard contract was incorporated to an individual contractual relationship or not.³⁸ In this form of review the standard contract is treated as an independent entity.³⁹ Initially (until 17 April 2016) the issue of abstract review had been regulated by the provisions of the CCC (479³⁶–479⁴⁵). Abstract review then had a court and administrative form, it was performed by the Regional Court in Warsaw – the Court for Competition and Consumer Protection (hereinafter: the Court).⁴⁰ It was the Court that decided about abusiveness of a given standard contract.⁴¹ Before the amendment the review had been performed in two dimensions – primary and secondary. An entity authorised under no longer applicable Articles 479³⁶–479⁴⁴ had to file a complaint with the Court. On considering a given standard contract contrary to applicable law the court issued a judgment prohibiting the use of this provision in a standard contract. Secondary review, on the other hand, consisted in the President of the Office of Competition and Consumer Protection examining in adminis-

31 Judgement of the Tribunal (fifth chamber) of 7 November 2019 in joint cases from C-349/18 to C-351/18;

32 It is worth noting that the mere introduction into the Polish order of regulations on abusive clauses in a way restricts the freedom of contract. See more in: P. Machnikowski, *Swoboda umów według art. 353¹ KC. Konstrukcja prawna*, Warsaw 2005, point II.

33 Decision of the Supreme Court of 28 May 2014, I CSK 607/13, LEX no. 1622296.

34 M. Grochowski, *Niedozwolone postanowienia w umowach konsumenckich: podstawa kontroli i jej granice w czasie*, "Monitor Prawniczy" 2019, no. 3, point II.

35 Judgment of the Court of Appeal in Białystok of 19 June 2019, I ACa 250/19, LEX no. 2716967.

36 B. Wyżykowski, *Abstrakcyjna kontrola postanowień wzorców umów*, "Przegląd Prawa Handlowego" 2013, no. 10, pp. 30–40.

37 M. Sieradzka, *Zakres niedozwolonych klauzul abuzywnych w umowach o kredyt konsumencki – określanie przesłanek zmiany stopy oprocentowania*. Glosa do wyroku SOKiK z 27 lutego 2015, XVII AmC 3477/13, 2015, LEX.

38 M.P. Ziemiak, *Postanowienia niedozwolone na tle umów ubezpieczenia*, Warsaw 2017, p. 292.

39 See A. Młostoń-Olszewska, *Możliwość orzekania o uznaniu za niedozwolone postanowień wzorca umowy sprzedaży z bezwzględnie obowiązującymi przepisami prawa – argumenty za i przeciw*, in: *Prawo konsumenckie w praktyce*, M. Czarnecka, T. Skoczny (eds.), Warsaw 2016, pp. 6ff. The author reflects there on seeing the standard contract as a separate entity. One needs to agree with the author's belief that "a standard contract is an act in law".

40 I. Szczepańska-Kulik, *Wzorce umów i niedozwolone postanowienia umowne w deweloperskiej praktyce rynkowej*, "Monitor Prawniczy" 2016, no. 16.

41 Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna. 13th edition*, Warsaw 2018, p. 175.

trative proceedings whether given standard contracts are identical to those included in the register of unlawful clauses.⁴²

The substantive and legal basis in the case of abstract review was and is the same as in the case of incidental review⁴³ (Articles 385¹ and 385³ CC), though today other regulations form part of this basis, which will be discussed in further parts.

The then form of review is problematic if only in the question of a great number of complaints filed with the Court, and thus a prolonged time of waiting. Moreover, the manner of interpreting judgments issued by the Court also caused problems – whether a given judgment is only binding on the parties or whether it is also binding *erga omnes*. Initially, a view was supported that a judgment in an abusiveness case was binding non only on the entity with regard to which it was issued but also on all professional entities (undertakings).⁴⁴ This position was backed up by the fact that the register of clauses is open and thus everyone can read it.⁴⁵ With time, though, a different position was shaped, in accordance with which any consumer may refer to such a judgment, though only with regard to the undertaking for whom such a judgment was passed.⁴⁶ In the reasoning alone for the draft project on amending the act on competition and consumer protection it was pointed out, that amending the form of abstract review is necessary due to the need to “eliminate doubts about effects of the court ruling in the case of declaring a standard contract unlawful”.⁴⁷

In order to overcome these inconveniences the so-called consumer amendment was introduced on 17 April 2016, whereby the aspects of reviewing standard contracts are no longer specified by the CCP, but by the act of 16 February 2007 on competition and consumer protection⁴⁸ (hereinafter the Act). The current Article 32a of the said Act speaks about the prohibition of application in standard contracts executed with consumers of provisions referred to in Article 385¹ § 1 CC.

Administrative review of standard contract provisions carried out by the President of the Office of Competition and Consumer Protection

In line with Article 23b of the Act the authority that may carry abstract review and issue a relevant decision in this regard is the President of the Office of Competition and Consumer

42 K. Lehmann, *Eliminowanie postanowień niedozwolonych z wykonywanych umów o charakterze ciągłym w obrocie konsumenckim*, in: *Prawo konsumenckie...*, pp. 45–47.

43 P. Mikłaszewicz, *Abstrakcyjna kontrola postanowień niezgodnionych indywidualnie. Komentarz do art. 385¹ KC*, in: *Kodeks cywilny. Komentarz*, K. Osajda (ed.), Vol. IIIa, Warsaw 2017, p. 266.

44 In its judgement of 20 June 2006 (III SK 7/06) the Supreme Court supported a position that “it is forbidden to employ in legal transactions provisions of standard contracts listed in the register as unlawful by all and against all counterparties occurring in legal relationships of a given type.”, LEX no. 278545.

45 See K. Kaczmarek, *Postanowienia niedozwolone – przeczytaj zanim podpiszesz umowę*, Warsaw 2011, p. 26 – this study prepared by the Office of Competition and Consumer Protection shows that “on entering a decision in the register the ruling is effective also for persons who did not participate in the proceedings. Anybody now can invoke the unlawful nature of the clause”.

46 Judgment of the Supreme Court of 20 September 2013, II CSK 708/12, LEX no. 1385871.

47 Reasoning for the draft act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts, LEX.

48 Dz. U. (Journal of Laws) of 2019 item 369 as amended.

Protection. The proceedings themselves in terms of abstract review are proceedings instituted *ex officio*, which is directly specified in Article 49 (1) of the Act but the proceedings themselves will be discussed still in further parts.

Classifying provisions of a given standard contract as abusive is done by way of a decision. The content of the decision is specified in detail in Article 23b of the Act. In the discussed Article the legislator pointed to elements which are obligatory for the President of the Office to point to and those that are optional. These optional elements aim to remove the effects of the occurrence in legal transactions of a given standard contract whose provisions have abusive nature. What is more and what has been pointed out in Article 23b of the Act it needs to be remembered that a decision on declaring a standard contract abusive is an administrative decision, thus it must include elements which are specified in the act of 14 June 1960 The Code of Administrative Procedure⁴⁹ (hereinafter CAP).⁵⁰

The President of the Office may in the decision among others oblige the undertaking to inform consumers who have executed contracts drawn up on the basis of a standard contract that a given provision of this standard contract has been defined as abusive. Moreover, the decision may specify an obligation for the undertaking to submit, in a specified manner and in a specified form, a single statement or multiple statements referring to the abusiveness of a provision of a given standard contract. Additionally, the legislator gave the authority the power to order in the decision to have its content published in a specified way, along with information about its validity – the cost of the publication to be borne by the undertaking. Naturally, when selecting measures the President of the Office should bear in mind the legitimacy of its application in order for it to be proportional to the violations.⁵¹ And what is more, when assessing a given standard contract the authority should also take into account whether or not the undertaking employs a given standard contract in legal transactions.⁵²

As a result of the conducted proceedings the President of the Office may issue three types of decisions. Namely, he may issue a decision on discontinuing the proceedings under Article 105 § 1 CAP in connection with Article 83 of the Act. The legislator does not prescribe in the Act for a possibility to issue a decision which would specify that a given provision of the standard contract is not abusive; the only thing the reviewing authority may do is discontinue the proceedings.⁵³ However, the President of the Office's discontinuing the proceedings does not exclude the possibility of the consumer invoking the abusiveness of the provision in the course of incidental review.⁵⁴ He may also issue a decision declaring a given provision abusive and impose a prohibition of applying it. He may also issue a decision about abusiveness and the prohibition of applying a given provision

49 Dz. U. (Journal of Laws) of 2018 item 2096 as amended.

50 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie wzorca umowy za niedozwolone*, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, A. Stawicki, E. Stawicki (eds.), Warsaw 2016, pp. 602–603.

51 K. Araczeńska, Ł. Wroński, *Wybrane zagadnienia „konsumentkiej” nowelizacji ustawy o ochronie konkurencji i konsumentów*, in: *Ochrona Klienta na rynku usług finansowych w świetle aktualnych problemów i regulacji prawnych*, E. Rutkowska-Tomaszewska (ed.), Warsaw 2017, p. 80.

52 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie...*, pp. 602–603.

53 See more in K. Araczeńska, Ł. Wroński, *Wybrane zagadnienia...*, pp. 79–82.

54 See Reasoning for the draft act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts, LEX.

along with obliging the undertaking to meet certain requirements referred to in Article 23b and 23c of the Act.⁵⁵

In terms of obligatory elements of the decision expressed in the Act – it must be a decision on the abusiveness of a given provision of a standard contract along with pointing to its content and an expression of the prohibition of applying the abusive provision in relations with consumers.

On top of what has been described above, the authority may impose a fine on the undertaking for violating Article 23b of the Act. Such a power is expressed in Article 106(1)(3) of the Act, according to which the President of the Office may impose upon an undertaking a fine of 10% of the turnover generated in the financial year preceding the year in which the fine is imposed for violating (even if unintentionally) among others Article 23b of the Act. Before the consumer amendment the Court had not been able to impose a fine for applying abusive provisions.⁵⁶ And thus in one decision the President of the Office imposed a fine upon an undertaking for applying the following provision in a standard contract – “The Parties represent that the provisions of this contract were individually agreed with the Buyer (which shall be understood as accepting them without comments or changing it by way of negotiations of both parties,...)”. The authority justified its opinion demonstrating that theoretically this wording implies individual agreement of the contract provisions with the consumer, while in fact it is the undertaking’s unilateral provision introduced into the standard contract. If an undertaking already at the stage of drawing up the standard contract, which nota bene is to be implemented in an unspecified number of individual contracts, represents that the provisions of the contract have been individually agreed with the buyer it is clear that this provision raises doubts as to the possibility for the consumer to influence the provisions included in the contract.⁵⁷

Irrespective of the above, the legislator conferred upon the President of the Office in Article 99d of the Act the power to make the decision immediately enforceable in whole or in part where consumers’ important interest requires so.

An undertaking may oblige itself before a decision referred to in Article 23b is issued to take certain measures or to forbear from doing so, the aim of which is to cease the violation of the prohibition to apply unlawful clauses or to remove the effects of violation thereof. In such a situation the authority may impose on the professional entity in the decision an obligation to perform such tasks with the requirement to submit reports on their performance at a specified time. Should the President of the Office employ the possibilities under Article 23c(1-3) the authority shall not issue a decision pursuant to Article 23b of the Act. Should the undertaking fail to perform tasks it was obliged to perform, the President of the Office may overrule the decision issued on this basis and impose on the undertaking a fine referred to in Article 106 of the Act. Regulations of Article 23c are in no way binding on the authority. Even if the undertaking undertakes to carry out the specified measures the President of the Office may not exercise the right expressed in the discussed regulation. In one of his decisions the President of the Office refused to exercise the right under Article 23c of the Act pointing out

55 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie...*, p. 604.

56 M.P. Ziemiak, *Postanowienia niedozwolone...*, p. 308.

57 Decision of the Office no. RPZ 5/2019, <http://uokik.gov.pl/decyzje/>.

that the measures undertaken by the undertaking are not sufficient to talk about the cessation of violation of Article 23a.⁵⁸ It is worth pointing out that the decision in question addressed an inclusion of an abusive provision in the rules and regulations of an online shop, which is why it needs to be stressed that rules and regulations should also be considered a standard contract.⁵⁹

It was flagged up in the introduction to the discussion of abstract review that a lot of problems were caused by the fact that it was not clear ultimately who the judgment given by the Court was to be applied to. At the moment this problem is solved by Article 23d of the Act, which clearly specifies for whom the decision issued as a result of abstract review is effective. Therefore, in compliance with the legal basis, a (final) decision issued by the President of the Office in relation to the performance of an abstract review of a given provision of a standard contract, is binding not only on the undertaking for whom it was issued, but it is also effective with regard to all consumers who executed a contract with a given undertaking on the basis of the standard contract specified in the decision. The literature calls such a state of affairs a unilateral extended effect of a final decision.⁶⁰ This regulation will be applicable not only to decisions issued on the basis of Article 23b but also on the basis of Article 23c of the Act. Even though the performance of abstract review is detached from any specific legal relation, it is due to the above-mentioned regulation that it has a direct effect on an individual consumer. They may then invoke the decision of the President of the Office with regard to an undertaking (only a final decision will be material for individual consumer interests).

As a rule, proceedings for abstract review are instituted *ex officio*, but for some entities the legislator has introduced the right to notify the President of the Office of violations of the prohibition referred to in Article 23a of the Act. The right to submit such notification was specified in Article 99a of the Act. In subsection 1 of the said regulation the legislator included a closed catalogue of entities who may submit such notification. Under the regulation in question a consumer among others may submit notification of the infringement of the prohibition of applying abusive clauses. Before the introduction of the consumer amendment the legislator had not specified that the notification could be submitted by a person enjoying the status of a consumer.⁶¹

In Article 99a(2) the legislator also listed obligatory elements that such notification must have, such as the undertaking against which the notification is submitted or pointing out the clause in the standard agreement that may be considered abusive.⁶²

In Article 99b(1) of the Act the legislator represented that everyone against whom proceedings have been instituted for declaring a given provision of the contract abusive is a party to the proceedings. When performing an interpretation in connection with the definition of a consumer (Article 22¹ CC) and an undertaking (Article 43¹ CC and Article 4(1) of the Act) and having regard to the content of Article 23a of the Act, it needs to be recognized that the

58 Decision of the Office no. RŁO 3/2019, <http://uokik.gov.pl/decyzje/>.

59 A. Młostoń-Olszewska, *Możliwość orzekania o uznaniu...*, p. 6.

60 A. Wiercińska-Krużewska, M. Prętki, *Decyzje w prawach o uznanie...*, p. 623.

61 See more in: E. Wójtowicz, *Stosowanie przepisów o klauzulach abuzywnych do przedsiębiorców przy umowach ubezpieczenia*, in: *Prawo konsumenckie w Polsce oraz innych państwach UE. Zagadnienia wybrane*, B. Gnela (ed.), Warsaw 2019, point 4.

62 J. Szczygieł, *Ochrona konsumenta przed niedozwolonymi postanowieniami umownymi we wzorcach umów kompleksowych na rynku energetycznym*, Warsaw 2019, LEX.

notion of a party to proceedings in terms of abstract review should be understood as referring solely to an undertaking.⁶³

A decision of the President of the Office may be appealed against at the Court which is regulated in detail in Article 81 of the Act.

At the end it is worth mentioning the institution of the register of unlawful clauses. Prior to 17 April 2016 a final judgment of the Court had been referred to the President of the Office, who then placed a provision which the Court had declared abusive in the register of unlawful clauses (Article 479⁴⁵ CCP).⁶⁴ On entering the provision deemed abusive in the register of clauses it gains broader material legitimacy and at the same time enhanced gravity of the matter ruled on, and thus no one can invoke before the Court abusiveness of the same provision with regard to the same undertaking.⁶⁵ What is essential, the register of abusive clauses is maintained on the basis of judicial decisions taking into account actions in terms of abusiveness of a given provision. The then principles for entering abusive provisions in the register made it completely incomprehensible and the clauses were often duplicated.⁶⁶ What is more, the register did not contain any reasoning or context for recognizing a given provision as abusive, thus an analysis of the register was rather difficult.⁶⁷

At present the register of unlawful clauses is maintained only for proceedings instituted before the entry into force of the consumer amendment and for which the old legal basis is applicable. This register in accordance with the amendments introduced by the act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts⁶⁸ will function for 10 years from the date of the amendment, that is until 17 April 2026.⁶⁹

At the moment, pursuant to Article 31b of the Act, decisions of the President of the Office are published on the website of the Office of Competition and Consumer Protection, not including business secrets or any other types of information protected under the law along with information about the decision being legally binding.

Conclusion

Introducing changes in terms of reviewing abusive clauses has a certainly positive character. Firstly, abstract review has actual significance for the protection of consumer rights, it allows elimination from legal transactions of provisions of standard contracts before they become an

63 Reasoning for the draft act of 5 August 2015 on amending the act on competition and consumer protection and certain other acts, LEX.

64 A. Cempura, A. Kasolik, *Metodyka sporządzania umów gospodarczych*, Warsaw 2014, p. 79.

65 T. Przemysław, *Komentarz do art. 479⁴⁵ KPC*, in: *Kodeks postępowania cywilnego. Komentarz aktualizowany. Vol. I. Art. 1-729*, A. Jakubecki (ed.), LEX 2019.

66 See more on defectiveness of the register of unlawful clauses in: M. Romanowski, *W sprawie charakteru i skutków abstrakcyjnej kontroli niedozwolonych postanowień wzorców umownych stosowanych przez przedsiębiorcę*, "Studia Prawa Prywatnego" 2010, no. 3. § 1.

67 M. Błachucki, *Publikacja decyzji wydawanych przez Prezesa UOKiK. Komentarz do art. 31b*, in: *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, A. Stawicki, E. Stawicki (eds.), Warsaw 2016, LEX.

68 Dz. U. (Journal of Laws) of 2015 item 1634.

69 M. Sieradzka, *Postanowienia umowne przewidujące możliwość zmiany powierzchni lokalu po zakończeniu inwestycji – dozwolona praktyka na rynku deweloperskim czy niedozwolona klauzula abuzywna*, in: *Ochrona konsumenta na rynku usług*, M. Jagielska, E. Sługocka-Krupa, K. Podgórski (eds.), Warsaw 2016, p. 234.

element of a specific contractual relationship. There are no doubts that transforming the form of abstract review from judicial and administrative into administrative greatly facilitated the process of eliminating abusive clauses. These proceedings are much shorter and publishing an entire decision about abusiveness allows for learning the context of placing a given provision in the standard contract and for learning the arguments for a given provision to be specified as unlawful. What is also approval-worthy is the fact that even if the President of the Office does not see an abusive provision in a given standard contract and as a result discontinues the proceedings, the consumer is not barred from pursuing his claims in judicial proceedings. To sum up, the consumer amendment of 17 April 2016 has a real impact on consumer protection, actually influences the scope of protection of their rights at the same time guarding the principle of contractual equality.

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