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## Resistance towards the Unfair Terms Directive in Poland: the interaction between the consumer *acquis* and a post-socialist legal culture

RAFAŁ MAŃKO

### Introduction

This chapter aims to present the interaction between the consumer *acquis* and post-socialist legal culture in Poland as exemplified by the rules on unfair terms in consumer contracts. It will focus on resistance towards Directive 93/13/EC among Polish legislators, scholars and judges, attempting to link this resistance to the background elements of the socialist legal tradition still present in Polish legal culture. The chapter will analyse two specific areas of resistance: the general test of unfairness and the abstract review of standard terms.

It will be argued that the general test of unfairness has been implemented in Poland in a way which departs from the directive – ‘good faith’ was substituted by ‘good customs’ and ‘significant imbalance’ was substituted by a ‘gross violation of interests’ of the consumer. It will be submitted that the implementing provisions are actually more lenient towards the trader than the directive requires. The interpretation of the implementing provisions within scholarship and case law is very often detached from the text of the directive and leads to conclusions hard to reconcile with the intent of the Community legislator. Judges and scholars tend to assimilate the ‘good customs’ clause with the socialist general clause of ‘principles of social coexistence’, still present within the Polish Civil Code, rather than exploring the meaning of ‘good faith’ in the directive.

Secondly, it will be argued that the rules on abstract review were implemented by the legislator in a piecemeal manner without providing

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specific guidance to the courts on how to perform this novel type of review. Many scholars, paying insufficient attention to the directive, have pronounced themselves against any form of abstract review and its third-party effects. There is also evidence within the case law showing that judges have virtually abstained from performing abstract review, resorting to concrete review instead and refusing to recognise the third-party effects of judgments condemning a given term as unfair. This anti-European entrenchment has however been reversed by a landmark decision of the Supreme Court.

### Historical background

It must be kept in mind that Poland (just like the other Central European countries that joined the European Union in 2004) has had a different experience with regard to consumer protection from Western European Member States. The difference of experience is a result of the political and socio-economic system prevalent in Poland (and Central Europe) between 1944 and 1989, which is often referred to as 'real or state-socialism'. While consumer protection played an important role within the mechanism of the market welfare state in Western Europe (as evidenced in the emergence of consumer protection law in the 1970s in France, Germany and the UK), in state socialist Poland this issue was not viewed as one of primary importance at the time. This was due to the fact that the vast majority of the economy was 'socialised' (i.e. owned by the state *de iure* or at least *de facto*);<sup>1</sup> thus, at least on the theoretical level, it belonged to the entire society.<sup>2</sup> However, consumer protection is based on a paradigm of opposition of interests between the consumer and the trader; therefore, in the system of a 'socialised economy' this opposition was difficult to uphold on the theoretical level.

As a result, the Civil Code enacted in 1964 contained neither a definition of a consumer<sup>3</sup> nor a distinct body of consumer protection

<sup>1</sup> Formally, the 'socialised economy' was comprised, on the one hand, of *de iure* state property (state enterprises) and, on the other hand, of cooperative property (which *de iure* was not state property). However, in the light of the centralisation of the cooperative movement in communist Poland and the effective control of the state over cooperatives one can say that cooperative property was *de facto* state property.

<sup>2</sup> Both the Constitution of 1952 and the Civil Code of 1964 made it clear that the notion of 'state property' was a synonym for 'property of the whole nation' (*mienie ogólnonarodowe*).

<sup>3</sup> The notion of a consumer was inserted to the Civil Code only in 2000 when the Unfair Terms Directive was implemented. See for more details below.

rules.<sup>4</sup> Quite ironically, in relationships between consumers and ‘units of socialised economy’ the Civil Code was actually based on the principle of freedom of contract.<sup>5</sup> This allows us to speak of a structural deficit of consumer protection in state socialist Poland.

This does not, however, imply that the Western European notions of consumer protection did not permeate into the Polish legal scholarship of that period. As a matter of fact, both the notion of consumer and the need to create a body of consumer law was appreciated by a number of scholars.<sup>6</sup>

Furthermore, the ever-deepening economic crisis in state socialist Poland, particularly acute in its terminal decade of existence (1980–9), leading to shortages of basic consumer goods (including everyday food-stuffs) placed the issue of consumer protection on a different level: the interest of the consumer became primarily focused on *obtaining* consumer goods rather than worrying about legal entitlements. It was not so much the fairness of the transaction that mattered but the the *conclusion* of the transaction as such. As a matter of fact, this led to the creation of peculiar consumer rights, e.g. the duty of the shop to display all goods for sale, rather than keep them ‘under the counter’ for sale only to selected consumers.<sup>7</sup>

The transformation from a centralised and state-owned economy to a capitalist economy, which occurred essentially between 1988 and 1990, led to an instant improvement in the market of consumer goods (without, however, avoiding poverty, hyperinflation and high unemployment). Furthermore, another obstacle to the development of consumer law, i.e. the lack of opposition of interests between

<sup>4</sup> The state socialist legislator did not see the need to create such a body of rules (see E. Łętowska, ‘Kształtowanie się odrębności obrotu mieszanego’ [The Emergence of the Distinct Character of Mixed Transactions] in E. Łętowska (ed.), *Tendencje rozwoju prawa cywilnego* [Trends in Development of Civil Law] (Warsaw: Zakład Narodowy im. Ossolińskich and Wydawnictwo Polskiej Akademii Nauk, 1983), 418–19.

<sup>5</sup> *Ibid.*, 425.

<sup>6</sup> See e.g. the definitions coined by E. Łętowska, ‘Ochrona konsumenta z punktu widzenia polityki prawa’ [Consumer Protection from the Point of View of Legal Policy] (1978) 4 *Państwo i Prawo* 16; C. Zuławska, *Obrót z udziałem konsumenta. Ochrona prawna* [Consumer Transactions: Legal Protection] (Warsaw: 1987), 17; S. Włodyka, *Prawo gospodarcze. Zarys systemu. Część ogólna* [Economic Law. Outline of a System: General Part] (Warsaw: 1982), vol. II, 72. Cf. M. Rejda, ‘Definicja konsumenta w rozumieniu kodeksu cywilnego (art. 22<sup>1</sup> k.c.)’ [The Definition of a Consumer Within the Meaning the Civil Code (Art. 22<sup>1</sup> CC)] (2006) 16(1) *Rejent* 118ff., at 126.

<sup>7</sup> Para. 6(2) General Terms of Contracts of Retail Sale of Goods and General Terms of Warranty (Monitor Polski 1983 No. 21, item 118) and para. 6 Regulation of Internal Commerce and Service of 14 February 1983 (Dziennik Ustaw, PRL No. 8, item 46).

the consumer and the 'socialised economy', was finally removed with the emergence of a private sector and the privatisation of the state sector, especially in the field of commerce. The argument that the consumer, as citizen, was theoretically the owner of the 'socialised' retail company could no longer be upheld. Nevertheless, attempts at introducing consumer protection in Poland were difficult and not always successful; legislative enactments were of doubtful quality and the attitude of the courts was far from being pro-consumer. It was pointed out that the courts lacked sensitivity towards the protection of consumer rights;<sup>8</sup> thus, regardless of the quality of the law-in-the-books, the law-in-action was certainly limping.<sup>9</sup>

### Europeanisation of Polish consumer law

Without any delay, after the transformation from a centrally planned and state-owned economy towards a capitalist economy and parliamentary democracy the Polish ruling elites opted for European integration as the country's goal. Therefore, in 1991 Poland signed an Association Agreement with the European Communities.<sup>10</sup> Article 68 of the Agreement imposed upon Poland the duty to (gradually) adapt its legal system to Community standards.<sup>11</sup> The actual nature of that duty was, however, the object of dispute. According to one group of authors, Article 68 merely imposed an obligation of best endeavours and not an obligation of result, whereby timetable and methodology would be left, *de iure* at least, to the Polish authorities.<sup>12</sup> According to another group of authors,

<sup>8</sup> E. Łętowska, *Prawo umów konsumenckich* [Consumer Contract Law] (Warsaw: C. H. Beck, 1999), 244.

<sup>9</sup> See e.g. E. Łętowska, 'Ochrona konsumenta jako problem legislacyjny okresu transformacji' [Consumer Protection as a Legislative Problem in the Period of Transformation] (1994) 1690 *Acta Universitatis Wratislaviensis* 91.

<sup>10</sup> The Accession Agreement, signed on 16 December 1991, entered into force on 1 February 1994.

<sup>11</sup> Cf. C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki* [European Community Law: Theoretical and Practical Issues] (Warsaw: C. H. Beck, 2000), vol. II, 788; A. Łazowski, *Adaptation of the Polish Legal System to European Union Law: Selected Aspects*, SEI Working Paper no. 45 (Sussex: 2001); Z. Brodecki and E. Gromnicka, *Układ Europejski z komentarzem* [The Europe Agreement with a Commentary] (Warsaw: Lexis Nexis, 2001); A. Łazowski, 'Approximation of Laws', in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement: a Commentary on the Enlargement Process* (The Hague: T.M.C. Asser Press, 2002), 631ff.

<sup>12</sup> S. Sołtysiński, 'Dostosowanie prawa polskiego do wymagań Układu Europejskiego' [The Adaptation of Polish Law to the Requirements of the Europe Agreement] (1996) 4–5 *Państwo i Prawo* 31, at 33; B. Nowak, 'Implementation of Directives into Domestic Legal

Article 68 was the source of an obligation of result from the time at which Poland filed a request for full Community membership on the basis of Article 49 EU – to the extent that the implementation of Community law was possible.<sup>13</sup> Regardless of that dispute it must be added that following signature of the accession treaty,<sup>14</sup> Poland undertook to implement<sup>15</sup> and apply the entire existing *acquis communautaire* by 30 April 2004, i.e. the last day prior to accession.<sup>16</sup>

Although consumer law was only a very small element of the entire *acquis* that was to be implemented, it has been noted that the European Commission, which was charged with the monitoring of Poland's implementation progress, exercised rigorous scrutiny with that regard during the period directly preceding Poland's accession to the EU.<sup>17</sup> Well-informed scholars (and insiders at the same time) have remarked that 'the Commission wanted Polish legislators to transfer the literal wording of directives into the national law'.<sup>18</sup> According to their account, the Commission's scrutiny took the form of a mechanical comparison of the English text of the relevant directive with an English translation of the Polish implementing measure which, as has been pointed out,

System: the Case of Poland' (2005) 9 *Yearbook of Polish Legal Studies* 67ff., at 67. This view was also presented by N. Reich, 'Transformation of Contract Law and Civil Justice in the New EU Member Countries' (2005) 23 *Penn State International Law Review* 587, at 599. See also Brodecki and Gromnicka, *Układ Europejski*, 100–1, who state that it is up to Poland to organise the harmonisation of the legislation.

<sup>13</sup> E. Piontek, 'Central and Eastern European Countries in Preparation for Membership in the European Union: a Polish Perspective' (1997) 1 *Yearbook of Polish European Studies* 73. Cf. A. Łazowski, 'Wybrane prawne aspekty rozszerzeń Unii Europejskiej w 2004 r. i 2007 r.' [Selected Legal Aspects of the Enlargements of the European Union in 2004 and 2007], in M. M. Kenig-Witkowska (ed.), *Prawo instytucjonalne Unii Europejskiej* [The Institutional Law of the European Union], 3rd edn (Warsaw: C. H. Beck, 2007), 422ff. at 435.

<sup>14</sup> Signed on 13 December 2003 in Athens.

<sup>15</sup> Some authors define the term 'implementation' as meaning both the legislative (transposition) and judicial (application) dimension of conforming to directives (see e.g. Nowak, 'Implementation', 67 n. 1). However, I will use the term 'implementation' as a synonym of the French transposition, thus referring exclusively to the legislative stage of respecting directives by the Member States.

<sup>16</sup> E. Łętowska and A. Wiewiórska-Domagalska, 'The Common Frame of Reference: the Perspective of a New Member State' (2007) 2 *European Review of Contract Law* 277ff., at 282.

<sup>17</sup> E. Łętowska, M. Jagielska, K. Lis, P. Mikłaszewicz and A. Wiewiórska-Domagalska, 'Implementation of Consumer Law in Poland' (2007) 6 *European Review of Private Law* 873ff., at 878 and 881.

<sup>18</sup> Łętowska and Wiewiórska-Domagalska, 'The Common Frame', 290. To the same effect see Łętowska *et al.*, 'Implementation', 882.

often led to misunderstandings.<sup>19</sup> Any departure by the Polish legislator from the literal wording of the directive was said to have caused suspicion and criticism from the side of the Commission,<sup>20</sup> whose officials were – goes the account – not keen on understanding the intricacies of the structure and operation of the Polish legal system.<sup>21</sup>

As to the Polish side, it should be mentioned that in 1994, the Legislative Council (a governmental advisory body on legislative matters) adopted an official position in which it expressed scepticism and concern regarding the dangers posed to national legal culture by EC law and stated that implementation of Community law:

may not lead to the loss of the specific and distinct character of the Polish legal system and to the imposition of alien conceptions and legislative approaches, not in conformity with this system . . . [T]he reform of Polish law may not be subject to a general slogan of adaptation to Community law.<sup>22</sup>

Similar concerns were also raised by certain scholars.<sup>23</sup> This distrust towards Community legal culture is indeed perplexing if one considers that the specific character of Polish law is said to lie only in a mixture of foreign ingredients.<sup>24</sup>

Bearing in mind the Legislative Council's approach, it is easier to understand why it took a decade for the first provisions of European private law directives to be implemented into Polish law. Although as of

<sup>19</sup> Łętowska and Wiewiórowska-Domagalska, 'The Common Frame', 291; Łętowska *et al.*, 'Implementation', 883. In this context one can wonder about the quality of the translations the Commission used during the screening process.

<sup>20</sup> Łętowska *et al.*, 'Implementation', 878.

<sup>21</sup> Łętowska and Wiewiórowska-Domagalska, 'The Common Frame', 291; Łętowska *et al.*, 'Implementation', 880.

<sup>22</sup> Stanowisko Rady, 'Legislacyjnej w sprawie dostosowania prawa polskiego do systemu prawa Unii Europejskiej' [Position of the Legislative Council of 25 March 1994 with regard to the adaptation of Polish law to the legal system of the European Union] (1994) 3 *Kwartalnik Prawa Prywatnego* 743ff., at 747.

<sup>23</sup> M. Nawrocka, 'Ochrona konsumenta przed nieuczciwymi klauzulami umownymi w Unii Europejskiej i w Polsce' [The Protection of the Consumer From Unfair Contractual Clauses in the European Union and in Poland] (1998) 6, *Monitor Prawniczy* 216ff., at 223.

<sup>24</sup> T. Giaro, 'Modernisierung durch Transfer: Schwund ostropeischer Rechtstraditionen', in T. Giaro (ed.), *Modernisierung durch Transfer im 19. und fruhen 20. Jahrhundert* (Frankfurt am Main: Vittorio Klostermann, 2006), 275ff., at 319ff. Cf. R. Mańko, 'Unifikacja europejskiego prawa prywatnego z perspektywy społeczeństwa polskiego – przyczynek do dyskusji' [The Unification of European Private Law from the Perspective of Polish Society] (2007–8) 11 *Nowa Europa* 35ff., at 47–52; R. Mańko, 'The Unification of Private Law in the European Union from the Perspective of Polish Legal Culture' (2007–8) 11 *Yearbook of Polish European Studies* 109ff., at 115–25.

1994, when the Europe Agreement entered into force, there were already six private law directives requiring implementation,<sup>25</sup> not to mention numerous directives in the field of company law,<sup>26</sup> it was not until 2000 that the Polish legislator made any progress in this direction, fuelling the concern of the scholarly community with regard to the slow pace of implementation.<sup>27</sup>

During the 1990s it had not been decided which model to following when transposing the consumer *acquis* into the Polish legal system. Three options were envisaged: implementation within multiple statutes (symmetrically to the directives); implementation within a single consumer act (something akin to the French *code de la consommation*); or implementation within the existing Civil Code of 1964. In 1999 the competent parliamentary committee proposed a bill for a single consumer act that was to consist of a general part with definitions and certain general principles and a specific part covering unfair terms, contracts concluded outside business premises, distance contracts, product safety, product liability, consumer credit, consumer arbitration and consumer organisations.<sup>28</sup> Eventually the government opted for the approach suggested by the Commission for the Codification of Civil Law. This approach was characterised by dualism: some issues (product liability and unfair terms) were to be regulated within the Civil Code, while other issues (distance contracts and contracts concluded outside business premises were) to be regulated in a separate statute.

It is worth noting that the Codification Commission proposed restraining legislative activity to the minimum levels of protection granted by the directives and rejected an extension of consumer rights beyond the scope explicitly required by the Community, claiming that this approach would 'better serve the harmonisation of law understood ... [as] the acceptance of the "philosophy" of the European directives.'<sup>29</sup>

<sup>25</sup> The Product Liability Directive 1985 (85/374); the Doorstep Selling Directive 1985 (85/577); the Commercial Agency Directive 1986 (86/653); the Consumer Credit Directive 1987 (87/102); the Package Travel Directive 1990 (90/314) and the Unfair Terms Directive 1993 (93/13). Soon afterwards the Timesharing Directive 1994 (94/47) was also adopted.

<sup>26</sup> Among these typically private law directives are the First, Second, Third, Sixth and Twelfth Company Directives (dated 1968, 1976, 1978, 1982, 1989).

<sup>27</sup> E. Łętowska, 'Ochrona konsumenta. Wprowadzenie' [Consumer Protection: An Introduction] (1996) 5:(2) *Kwartalnik Prawa Prywatnego* 383ff., at 390.

<sup>28</sup> 'Poselski projekt ustawy o ochronie konsumentów' [Parliamentary Draft Consumer Protection Act] (1999) 8(3) *Kwartalnik Prawa Prywatnego* 611ff.

<sup>29</sup> See Draft Doorstep and Distance Contracts Act 1998, 351.

Currently, the Commission for the Codification of Civil Law under the presidency of Professor Zbigniew Radwański<sup>30</sup> is preparing a new draft Civil Code.<sup>31</sup> As of early 2012, only book I of the draft was available (which had been published in 2008).<sup>32</sup> It was the intent of the Codification Commission to publish the remaining books of the draft by 2010; however, those optimistic plans were not executed.<sup>33</sup> As a matter of fact, in 2010 judges of the Civil Chamber of the Supreme Court have pronounced negatively with regard to the draft book I and, in general, have been against the enactment of a new Civil Code.<sup>34</sup> The Codification Commission<sup>35</sup> seems to have abandoned the idea of a new Civil Code.

### The implementation and application of the general prohibition of unfair terms

#### *Legislative transposition*

The good faith clause contained in the general prohibition of unfair terms certainly constitutes the core of Directive 93/13; the good faith clause has been the source of certain controversy between scholars, some of whom regard it as a 'legal irritant' from the point of view of Anglo-Saxon legal culture.<sup>36</sup> It is therefore worth scrutinising how the Polish legislature dealt with this centrepiece of the Unfair Terms Directive. And this is where the comparative lawyer must admit to

<sup>30</sup> Biography at [http://pl.wikipedia.org/wiki/Zbigniew\\_Radwa%C5%84ski](http://pl.wikipedia.org/wiki/Zbigniew_Radwa%C5%84ski) (accessed 1 March 2010).

<sup>31</sup> Z. Radwański (ed.), *Zielona księga. Optymalna wizja kodeksu cywilnego w Rzeczypospolitej Polskiej* [Green Paper: Optimal Vision of the Civil Code in the Republic of Poland] (Warsaw: Oficyna Wydawnicza Ministerstwa Sprawiedliwości, 2006).

<sup>32</sup> *Księga pierwsza Kodeksu cywilnego. Projekt z uzasadnieniem* [book I of the Civil Code: a Draft With Motives] (Warsaw: 2008); available online at: <http://www.ms.gov.pl/kkpc/proj080227.rtf> (accessed 1 March 2010).

<sup>33</sup> M. Domagalski, 'Nowy kodeks nie teraz' [New Code Not Now], *Rzeczpospolita*, online edition [www.rp.pl](http://www.rp.pl), accessed 22 March 2010. See also M. Domagalski interviewing Z. Radwański, 'Nowy kodeks cywilny trudniejszy niż sądzono' [New Civil Code More Difficult than it Was Thought], *Rzeczpospolita*, online edition [www.rp.pl](http://www.rp.pl), accessed 22 March 2010.

<sup>34</sup> *Projekt Kodeksu cywilnego. Księga pierwsza. Sprawozdanie z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego* [Draft Civil Code. Book I. Minutes of the Discussion in the Civil Chamber of the Supreme Court] (2010) 10, *Przegląd Sądowy*, 104–23.

<sup>35</sup> Domagalski, 'Nowy kodeks'.

<sup>36</sup> G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 *MLR* 11ff.

being surprised by the Polish solution, for the good faith (*bona fides*) clause has been substituted by another general clause, also originating from Roman law, but quite different in its scope and significance<sup>37</sup> – the immorality clause.<sup>38</sup> One could argue that the latter clause is more favourable towards businesses, given that *bona fides* encompasses more than *contra bonos mores*, including the subjective and psychological elements of the contractual relationship. The drafters responsible for the elimination of *bona fides* in the Polish transposition measure have defended their choice by the alleged necessity of avoiding the confusion between *bona fides* in its objective and subjective sense.<sup>39</sup>

Another crucial concept contained in the directive's prohibition of unfair terms is the requirement that the incriminated contractual term cause a significant imbalance in the contractual relationship between the trader and the consumer. With regard to that requirement, the Polish legislature once again opted to depart from the wording chosen by the Community law-makers. Thus, instead of referring to an 'essential' or 'significant' (and unjustified) disproportion or imbalance between the rights and duties of the parties to a consumer contract, Polish law uses a concept unknown to the directive, namely that of a 'gross violation of the consumer's interests'. It has been argued that the 'gross violation' test is more lenient to the economic operator than the 'significant imbalance' test within the directive, pointing out that this modification can be qualified as an infringement of EU law.<sup>40</sup>

<sup>37</sup> The general clauses of 'good faith' (*bona fides*) and 'good customs' (*contra bonos mores*) may not be placed on an equal footing because they refer to different criteria of evaluation (M. Pilich, 'Zasady współzycia społecznego, dobre obyczaje czy dobra wiara? Dylematy nowelizacji klauzul generalnych prawa cywilnego w perspektywie europejskiej' [Principles of Social Coexistence, Good Customs or Good Faith? Dilemmas of Amending the General Clauses of Civil Law in a European Perspective], in M. Pazdan *et al.* (eds.), *Europeizacja prawa prywatnego* [The Europeanisation of Private Law] (Warsaw: Oficyna a Wolters Kluwer Business, 2008), vol. II, 179.

<sup>38</sup> The Civil Code in its Art. 3851 §1 sentence 1, provides as follows: 'The terms of a contract concluded with a consumer, not negotiated individually, are not binding upon him, if they shape his rights and duties in a manner contrary to good customs and grossly violate his interests (prohibited contractual terms).'

<sup>39</sup> Cf. Z. Radwański and M. Zieliński, 'Uwagi *de lege ferenda* o klauzulach generalnych w prawie prywatnym' [*De Lege Ferenda* Remarks on General Clauses in Private Law] [2001] 2 *Przegląd Legislacyjny* 11ff., at 24.

<sup>40</sup> Pilich, 'Zasady współzycia', 178.

The legislature, when choosing to opt for a 'gross violation of interests' instead of a 'significant imbalance', was probably inspired by the formulation of the prohibition of unfair terms as introduced in 1990 into Article 385<sup>2</sup> of the Civil Code.<sup>41</sup> However, despite its *prima facie* pro-consumer character, this provision did not prove to be an effective means of reviewing standard terms. It was criticised by scholars for various reasons<sup>42</sup> and it was virtually not applied by the court in practice.<sup>43</sup> In this light the choice of the same expression as in the ineffective and dead-letter rules of 1990 could be seen as an indication to the courts that a 'gross violation of consumer's interests' was something extremely rare and extraordinary, rather than a frequent practice of economic operators which must be eliminated by the courts as part of their everyday duties.

The two modifications of the normative content of the directive – the substitution of *bona fides* by *contra bonos mores* and the 'significant imbalance' test by the 'gross violation of interests' test – should be linked together. The *bona fides* standard is strictly connected to the idea of contractual equilibrium; thus there is a conceptual correlation between the violation of good faith and significant imbalance. On the other hand, the *contra bonos mores* standard is, arguably, more lenient towards the contracting party acting dishonestly, and is not connected to the lack of contractual equilibrium but rather to a violation of basic Community standards. An obvious correlation between the *contra bonos mores* standard and contractual equilibrium seems to be lacking; hence the legislature coupled it with the standard of a 'gross violation of interests' which is linked (in its terminology) with the standard of 'gross negligence'.

<sup>41</sup> Art. 385<sup>2</sup> of the Civil Code in its version of 1990 provided that:

§1. Where the general conditions of contracts, model contracts and regulations result in grossly unjustified benefits accruing to the party who relies thereupon, the other party may request the court to declare their application ineffective. However, this may not take place later than one month following performance of the contract.

§2. The entitlement contemplated by the above section shall not extend to persons concluding contracts within the sphere of their economic activity.

<sup>42</sup> W. Popiołek in K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz. Tom I* [Civil Code: a Commentary. Vol. I] (Warsaw: C. H. Beck, 1997), 711; M. Bednarek, *Wzorce umów w prawie polskim* [Standard Terms in Polish Law] (Warsaw: C. H. Beck, 2005), p. 48.

<sup>43</sup> Łętowska, 'Ochrona', 91; P. Podrecki and F. Zoll, 'Odpowiedzialność podmiotów świadczących usługi' [The Liability of Subjects Providing Services], in E. Traple and M. du Vall, *Ochrona konsumenta. Część I. Opracowanie analityczne* [Consumer Protection. Part I: Analytical Elaboration] (Warsaw: Urząd Komitetu Integracji Europejskiej, 1998), 132.

In light of the above it seems that on the law-in-the-books level the choices effected by the Polish legislature while transposing the Unfair Terms Directive could constitute a departure from the minimum standards of the directive, in favour of economic operators but to the detriment of consumers. However, the actual meaning of the black-letter rules of the Civil Code is a matter of interpretation performed by scholars and judges who carve out the actual law-in-action. In the following sections I shall discuss this aspect.

### *Doctrinal interpretation and judicial application*

While the legislature substituted *contra bonos mores* for *bona fides*, it seems that the doctrine of private law has moved even further away from the letter and spirit of the Community instrument, proposing to interpret the *contra bonos mores* clause in the light of the general clause of ‘principles of social coexistence’ (*zasady współżycia społecznego*). The latter general clause was introduced into the Polish legal system back in 1950 as a transplant from the laws of the Soviet Union.<sup>44</sup> At the time of their transposition into Polish law, the ‘principles of social coexistence’ were viewed as the expression of the new, socialist morality, as opposed to the bourgeois general clauses of the capitalist legal system, such as equity (*aequitas*), good faith (*bona fides*) and good customs (*boni mores*).<sup>45</sup> The ‘principles of social coexistence’ permeated the entire Civil Code ousting all the traditional general clauses. Quite remarkably, after 1990 they were retained and were still used in new legislative enactments. Since 1999, however, new legislative instruments have not employed this socialist general clause but resorted to ‘equity’ or ‘good customs’ instead. This led to a dualism of general clauses in Polish private law which perplexed the doctrine and judiciary, who came up with various interpretations of this cohabitation.

Without, therefore, going into the details of this discussion it is necessary to point out here the specific features of the principles of

<sup>44</sup> The law of the Soviet Union knew a general clause of ‘principles of socialist coexistence’, contained both in the Constitution and in civil law legislation; this model was exported to other countries belonging to the socialist legal family (A. Wolter, *Prawo cywilne. Część ogólna* [Civil Law: the General Part] (Warsaw: Państwowe Wydawnictwo Naukowe, 1955), 62–3; T. Justyński, *Nadużycie prawa w polskim prawie cywilnym* [Abuse of Right in Polish Civil Law] (Cracow: Zakamycze, 2000), 97.

<sup>45</sup> S. Szer, *Prawo cywilne* [Civil Law], 2nd edn (Warsaw: 1962), 25; J. Nowacki, ‘Niektóre zagadnienia zasad współżycia społecznego’ [Certain Issues Regarding the Principles of Social Coexistence] (1957) 12 (7–8) *Państwo i Prawo* 99ff., at 107.

social coexistence which have been developed by the doctrine and judiciary of the socialist period and which have, as a rule, been upheld until now. First of all, the principles are considered to be a synthesis of the actual views of society rather than an equitable solution found by the judge on his own responsibility. Hence the judge is formally speaking reduced to the role of a spokesperson of the ethical views of society, a social scientist in a judicial gown. Secondly, the judge applying the principles is supposed to single out and identify a concrete principle of social coexistence that she or he is applying to the facts of the case. A mere reference to the principles of social coexistence in general and in the plural is not sufficient. Thirdly, the principles of social coexistence are objective in character. Unlike the good faith clause, they are not supposed to encompass the subjective intent of the parties. A judge applying the principles of social coexistence is expected to evaluate the parties' conduct only on the basis of their external behaviour, and not their subjective motivation. Fourthly, the principles of social coexistence were originally intended as a uniform general clause. The principles displaced a variety of general clauses (such as good faith, equity, good customs, fair dealing) thus substituting a variety of standards with one uniform standard. Thus the differentiation of standards as between the more demanding *Treu und Glauben* standard and the less demanding *gute Sitten* standard (as in the German BGB) was not known to the Polish Civil Code.

Taking this context into account, scholarly interpretations according to which the *contra bonos mores* standard (found in the Polish provisions implementing the Unfair Terms Directive) is 'similar, or even identical to, the clause on principles of social coexistence' (Skory) is not without impact upon the judicial application of that standard. In fact, following the tradition of case law during the socialist period, where concrete (singled out) principles of social coexistence had to be pleaded (as opposed to the notion of principles of social coexistence in general), Skory advocates the same approach in relation to good customs. What is characteristic in Skory's approach is that, in analysing the content of the 'good customs' concept, he does not regard it as an implementation of the directive's good faith requirement (which is defined in the directive's preamble) but analyses it quite independently of the directive, resorting either to pre-war Polish definitions of good customs or to the socialist notion of principles of social coexistence. There is no reference to objective good faith in Skory's analysis, despite its presence as a general clause in pre-socialist legislation (as one of the general clauses in the

Code of Obligations). This indicates how strong the intellectual link remains between socialist legal culture and its principles of social coexistence and, conversely, how weak is the cultural impact of Europeanisation.

In the context of unfair terms Łętowska also assumed the indistinguishable character of 'good customs' and 'principles of social coexistence',<sup>46</sup> seeing no difference in the functioning of good faith, good customs and the principles of social coexistence. It is therefore no wonder that scholars such as Małgorzata Bednarek<sup>47</sup> consider that, when interpreting the clause of 'good customs', courts and scholars refer to case law concerning the principles of social coexistence (a similar approach is implicitly taken by Podrecki and Zoll).<sup>48</sup> This approach of interchangeability of general clauses deprives them of any individual character; they are treated as synonymous expressions of the legal language and, as a consequence, they entail the same methodology and the same standard.

However, it is not only scholars who tend to equate 'good customs' and the 'principles of social coexistence'. There is a host of case law (also regarding unfair terms) which indicates that courts feel entitled to use the two concepts interchangeably<sup>49</sup> and actually go so far as to identify the specific 'principle of good customs' [sic!] applicable in the case.

<sup>46</sup> E. Łętowska, *Ochrona niektórych praw konsumentów. Komentarz* [The Protection of Certain Rights of Consumers: a Commentary], 3rd edn (Warsaw: C. H. Beck, 2001), 104: 'As regards the technique of applying general clauses, the reform introduced is of no significance: every general clause ultimately rests upon the evaluation of the judge and his axiological feeling, determined by objective and subjective criteria which ought to be explicitly stated in the judgment.'

<sup>47</sup> Bednarek, *Wzorce*, 180.

<sup>48</sup> P. Podrecki and F. Zoll, 'Odpowiedzialność podmiotów świadczących usługi' [The Liability of Subjects Providing Services], in Traple and du Vall. *Ochrona konsumenta*, 140: 'the precise phraseology deployed (whether principles of social coexistence, good custom, good faith in the objective sense, requirements of loyalty) is essentially a matter of legislative elegance.'

<sup>49</sup> See e.g. the judgment of the Court of Appeal in Łódź of 22 April 1992 in case I ACr 132/92, *Dom Mody Nestor v. Przedsiębiorstwo Gospodarki Mieszkańcowej*, OSA 1993/5/34: 'The principles of social coexistence are rules of conduct which are closely linked to moral and customary norms. Beyond doubt good customs [*boni mores*] which are binding in legal transactions are part of them.' See also judgment of the Supreme Court of 6 May 1998 in case II CKN 734/97, *Przedsiębiorstwo Produkcyjno-Usługowe E. v. Przedsiębiorstwo Produkcyjno-Handlowe E.-B.*, OSNC 1999/2/25; judgment of the Supreme Court of 22 April 2004 in case I CK 547/03, *Halina G. v. Grażyna T. and Jan T., M. Spół*, 2005/3/67: 'The principles of social coexistence also referred to as good customs are a general clause.' The same phrase was later repeated by the Supreme Court in its judgment of 23 April 2004 in case I CK 548/03 *Ryszard G. v. Grażyna T. and Ewa R.*, LEX no. 334983 and in a judgment of the same day in case I CK 550/03 *Jerzy Z. v. Grażyna T. and Ewa R.*, LEX no. 188472.

The Supreme Court is making efforts to change this attitude of the lower courts. In a judgment of 3 February 2006,<sup>50</sup> explicitly invoking the directive as its source of inspiration, that Court remarked that:

It is impossible to agree with the appellant's submissions that the court is under a duty to specify which particular 'good custom' was violated *in casu*. The appellant's view is based on the premise that the normative system to which the general clause of good customs refers is a closed catalogue . . . The lower courts ought to have comprehensively justified the reasons for finding a particular term to be unlawful, invoking the ethical rules of honest and loyal dealing in transactions. They were not, however, under a duty to point to a concrete principle.

Another issue is the relationship between the *contra bonos mores* clause and the gross violation of the consumer's interests. Are these two separate and cumulative premises of unfairness which have to be fulfilled jointly to trigger the sanction of ineffectiveness ('not binding') or are they just two sides of one standard? According to Maciej Skory the first interpretation is right, i.e. the shaping of rights and duties in contravention of good customs and the gross violation of the consumer's interest are two independent and separate conditions of unfairness.<sup>51</sup> What is more, the violation of good customs should, according to Skory, be treated as remaining in a causal link with the violation of the consumer's interest (as its cause).<sup>52</sup>

As a matter of fact, this view has even been adopted by the Supreme Court in its judgment of 6 April 2004,<sup>53</sup> in which it pointed out that there were four separate premises of unfairness, among which a violation of *boni mores* and a gross violation of the consumer's interests were two separate premises which had to be fulfilled jointly. Therefore, according to the Supreme Court, it is possible for a particular term to violate good customs and to violate the interests of the consumer, although in a less than flagrant way (Skory)<sup>54</sup> or that one could imagine a truly gross violation of the consumer's interest which would not violate good

However, in a judgment of 26 January 2006 (case II CK 378/05, V v. J, LEX no. 172222, Wokanda 2006/6/8) the Supreme Court stated that the good customs were a part of a wider general clause, i.e. the principles of social coexistence.

<sup>50</sup> Case I CK 297/05 *UPC Polska*, LEX no. 179741, Wokanda 2006/7–8/18.

<sup>51</sup> M. Jagielska, 'Niedozwolone klauzule umowne' [Prohibited Contractual Terms], in E. Nowińska and P. Cybula, *Europejskie prawo konsumenckie a prawo polskie* [European Consumer Law and Polish Law] (Cracow: Zakamycze, 2005), 57ff., at 83.

<sup>52</sup> M. Skory, *Klauzule abuzywne w polskim prawie ochrony konsumenta* [Unfair Terms in Polish Consumer Protection Law] (Cracow: Zakamycze, 2005), 173.

<sup>53</sup> Case I CK 472/03, LEX no. 125052. <sup>54</sup> Skory, *Klauzule*, 177.

customs (Popiołek).<sup>55</sup> The introduction of the need for a causal link between the violation of good customs and the violation of the consumer's interest creates additional issues, especially as regards the nature of that causal link.<sup>56</sup>

In my opinion this represents the introduction of a new element into the test of unfairness, one not found in the directive itself, which lowers the standard imposed upon the trader and, as a consequence, lowers the protection afforded to the consumer. Ultimately, this creates a situation in which a particular term may be regarded as violating good customs but, at the same time, not violating the consumer's interests flagrantly (Skory).<sup>57</sup> Such an interpretation of the Polish provision – perfectly correct within the limits of its text (Pecyna)<sup>58</sup> – runs counter to the spirit and even letter of the directive. Furthermore, as I already indicated above, the use of the term 'grossly' (*rażąco*) in the Polish Code may be interpreted otherwise than 'significant' in the directive, since this adjective is already present in numerous articles of the Civil Code. Indeed some scholars, such as Skory, encourage resort to the literature and case law regarding those articles in order to interpret the term 'grossly' in the provisions implementing the directive. Thus, instead of interpreting the notion of 'gross violation' in the spirit of the directive's 'significant imbalance', Polish scholars and judges are invited to resort to national standards, which were developed in areas of the law other than unfair terms, such as the law of delict and its concept of gross negligence.<sup>59</sup>

In its judgment of 3 February 2006<sup>60</sup> the Supreme Court ruled in favour of a pro-Community interpretation of the relevant rules of the Civil Code and established a clear and direct link between the notion of 'violation of interests' (in Polish law) and the notion of 'imbalance of rights and duties' (in European law). A similar link was established by the Supreme Court between the notions of 'gross' (in Polish law) and 'essential' (in European law). In this judgment the Polish implementing

<sup>55</sup> W. Popiołek, in K. Pietrzykowski (ed.), *Kodeks cywilny*, 4th edn (Warsaw: C. H. Beck 2005), 987.

<sup>56</sup> Skory, *Klauzule*, 174. <sup>57</sup> *Ibid.*, 175.

<sup>58</sup> M. Pecyna, *Kontrola wzorców poza obrotem konsumenckim* [Control of Model Contracts in Non-Consumer Transactions] (Cracow: Zakamycze, 2003), 141–2.

<sup>59</sup> Arts. 14 §2 (gross injury to an incapacitated party to a contract), 202 (juridical act grossly violating the principles of sound management of common property), 303 (gross infringement of holder of a servitude), 371, 388, 484, 685, 757, 777, 781, 788 (as indicated by Skory, *Klauzule*, 178 n. 323).

<sup>60</sup> Case I CK 297/2005, *Miejski i Powiatowy Rzecznik Konsumentów w L. v. U*, LexPolonica no. 399979, LEX no. 179741, Biul.SN 2006/5/12, Wokanda 2006/7–8/18.

measure, however distant its wording may be from that of the directive, was clearly linked to the latter instrument, ensuring an effectively pro-Community interpretation of the national rules. However, one can wonder whether the Supreme Court's reasoning is not an example of *praeter legem* interpretation, necessary to ensure Poland's compliance with its duties under the Unfair Terms Directive despite the legislature's extravagancies.

## The implementation of abstract review of unfair terms

### *Legislative transposition*

Within European law, the rules pertaining to the abstract review of unfair terms are to be found both in Article 7 of the Unfair Terms Directive and in the Injunctions Directive (98/27).<sup>61</sup> The latter directive permits the use of injunctions to protect the collective interests of the consumer; the Member States may permit injunction petitions to be brought by independent public bodies or by consumer organisations. The Injunctions Directive also explicitly deals with the collective interests of consumers covered by the Unfair Terms Directive.

The rules regarding abstract review have been transposed by the Polish legislature exclusively within the Code of Civil Procedure, while no corresponding substantive-law rules have been provided for.<sup>62</sup> Exclusive jurisdiction in those cases has been vested in the Competition and Consumer Protection Court in Warsaw (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter referred to as 'Consumer Court').<sup>63</sup> *Locus standi* has been granted to a wide range of claimants, including people who, in the light of the defendant's offer, may have entered into a contract containing an unfair term; a Polish or EU consumer organisation; a district or town Consumer Ombudsperson; the President of the Office for the Protection of Competition and Consumers; any prosecutor; the (national) Ombudsperson.<sup>64</sup> The actions become time barred

<sup>61</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests ([1998] OJ L 166 51–55).

<sup>62</sup> Cf. Skory, *Klauzule*, 287ff.; Flaga-Gieruszyńska in *Kodeks*, 2006, 1401. Supreme Court judgment of 11 October 2007 in Case III SK 19/07 *DK v. Telekomunikacja Polska SA*, LEX no. 496411, para. 3.

<sup>63</sup> Article 479<sup>36</sup> of ustawa z dnia z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego [Act of 17 November 1964 – Code of Civil Procedure] (Dz.U. no. 43, item 296 with further amendments, hereinafter referred to as Code of Civil Procedure).

<sup>64</sup> Art. 479<sup>38</sup> Code of Civil Procedure.

after the expiry of a six-month deadline following the performance (or expiry) of the contract but they may be brought throughout the period of applicability of a standard-form contract containing an unfair term.<sup>65</sup>

From the perspective of the third-party effects of a judicial decision pronouncing that a particular contractual term is unlawful one should point above all to Article 479<sup>43</sup> of the Code of Civil Procedure which provides that a ‘judgment having the force of *res judicata* is binding upon third parties from the moment at which the term found to be unlawful is entered into the register [of unfair terms]’.

Judgments having the force of *res judicata* are published both in a dedicated Register of Unfair Terms and in the *Judicial and Economic Monitor*.<sup>66</sup> Two issues remain open as regards a literal interpretation of the legislative provisions. First of all, the procedural provisions do not explicitly establish the actual standard of unfairness (test of unfairness) that ought to be applied by the courts,<sup>67</sup> i.e. whether this should be the same standard as in the concrete review of unfair terms (defined in Article 385<sup>1</sup> of the Civil Code) or whether this standard should be applied *mutatis mutandis* or by way of analogy only, or indeed be entirely replaced with a different test. Secondly, the rule concerning the third-party effects of a judgment (Article 479<sup>43</sup> of the Code of Civil Procedure) is extremely succinct and fails to define the scope of this rule (i.e. whether it applies only to the particular unfair term, other similar unfair terms, or any terms having the same or similar purpose or effect). On the level of black-letter rules, the two issues remain unresolved and require a doctrinal and judicial creative interpretation. The latter could either be inspired by the relevant EU instruments or be an autonomous interpretation, based only on sources of national law. The latter case could open the door to a negation of the very concept of abstract review and attempts at reinterpreting it as a form of concrete review. In the following sections I will show that such attempts – which may be qualified as resistance towards EU law – have actually taken place.

### *Doctrinal and judicial interpretation*

Certain Polish authors have negated the third-party effects of judicial decisions declaring a particular term to be unfair. One such author, M. Skory, expressed the view that the third-party effect was synonymous

<sup>65</sup> Art. 479<sup>39</sup> Code of Civil Procedure.      <sup>66</sup> Art. 479<sup>44</sup> Code of Civil Procedure.

<sup>67</sup> Cfr Skory, *Klauzule*, 287ff.; Flaga-Gieruszyńska in *Kodeks*, 1401.

with the fact that anyone may invoke the judgment, although the prohibition itself was, according to him, binding exclusively on the defendant and not on other economic operators.<sup>68</sup> In my view such an interpretation completely deprives the third-party effect provided for in Article 479<sup>13</sup> of the Code of Civil Procedure of any real content. Such a reading of this provision would allow other economic operators to continue using a standard term which had already been ruled unlawful. Characteristically, in his argumentation in support of the narrow interpretation, Skory fails to mention the Unfair Terms Directive even once<sup>69</sup> and bases his entire reasoning solely on Polish transposition measures. M. Skory's view gained support in the writings of M. Jagielska.<sup>70</sup>

In order to support their interpretation, the members of the doctrine opposing the abstract review of unfair terms have relied upon two types of argument. The first argument (which may be dubbed 'pragmatic' or 'practical') rests upon the assumption that an unfair term could actually be fair if used by a different economic operator, in a different sector of the economy or in a different type of contract.<sup>71</sup>

The second argument (which can be dubbed as 'ideological') rests upon the fear of giving judges law-making powers.<sup>72</sup> It must be kept in

<sup>68</sup> Skory, *Klauzule*, 306. <sup>69</sup> *Ibid.*, 298–308.

<sup>70</sup> M. Jagielska, 'Niedozwolone klauzule umowne' [Prohibited Contractual Terms] in E. Nowińska and P. Cybula, *Europejskie prawo konsumenckie a prawo polskie* [European Consumer Law and Polish Law] (Cracow: Zakamycze, 2005), 57ff., at 95–6: '[A] judgment having the force of *res judicata* is effective only "unilaterally": towards consumers and not other traders . . . [I]f the term is used in a different standard-form contract by a different trader, it will be necessary to review it once again'.

<sup>71</sup> Skory, *Klauzule*, 291–3, 295, 296–7, 304–6; I. Wesołowska, 'Niedozwolone postanowienia umowne' [Prohibited Contractual Terms], in C. Banasiński (ed.), *Standardy wspólnotowe w polskim prawie ochrony konsumenta* (Warsaw: Prawo i Praktyka Gospodarcza, 2004), 196; Jagielska, 'Niedozwolone', 95–7.

<sup>72</sup> Skory, *Klauzule*, 306–8:

A further argument to support the position outlined above may be found when analysing the provisions from the perspective of the conformity of the legal norms derived from those provisions with the fundamental rules governing the functioning of the state, as expressed in the Constitution. To accept that . . . registration of the judgment of the Court for the Protection of Competition and Consumers would entail a prohibition upon use of such terms by all subjects and in all conditions would be tantamount to establishment of a general and abstract legal norm by the court . . . This would mean that the Court for the Protection of Competition and Consumers is entitled to create the law, whereas the creation of law is constitutionally guaranteed as being within the exclusive competence of legislative bodies and not bodies applying the law. Accordingly, this would violate . . . the Constitution. Jagielska, 'Niedozwolone', 96:

mind that a rigid negation of judicial law-making was a characteristic feature of state-socialist legal scholarship; therefore its presence in the Polish debate on abstract review of unfair terms may be seen as an instance of the interaction of the post-socialist elements in legal culture on the one hand and European elements on the other.

Similar resistance towards abstract review can be found in the case law. In a judgment of 11 June 2003<sup>73</sup> the Consumer Court also adopted a narrow view, limiting third-party effects solely to the trader who was actually party to the proceedings. In numerous cases the Consumer Court recondemned unfair terms which had already been entered into the Register of Unfair Terms even in situations where the terms were identically phrased.<sup>74</sup> As a result, one single term was entered into the Register as many as five times, the only difference being the name of the economic operator using the term (which was not always mentioned).<sup>75</sup> The Consumer Court explicitly rejected the view that an unfair term condemned during abstract review could not be used by other economic operators (even if copied literally).<sup>76</sup> It also ruled that only those consumers who actually entered into a contract with the rogue economic

The consequence of applying Article 479<sup>43</sup> [Code of Civil Procedure 1964] as the basis for issuing judgments effective ‘bilaterally’ – both *vis-à-vis* all consumers and all traders – raises doubts of a constitutional nature. The registration of a clause has the same effect as the addition of a new term to the list of prohibited terms in Article 385<sup>3</sup> of the Civil Code. The actions of a court, an adjudicating body, would become law-making actions and the court’s judgment would need to be treated as a source of law which contradicts Article 84 of the Constitution of the Republic of Poland.

<sup>73</sup> Case XVII Amc 46/02.

<sup>74</sup> Cf. Jagielska, ‘Niedozwolone’, 95.

<sup>75</sup> ‘In situations unforeseen by this contract, decision shall be taken by [trader’s name] in the form of an ordinance’ – see Register of Unfair Terms [*Rejestr Klauzul Niedozwolonych* – [www.uokik.gov.pl](http://www.uokik.gov.pl)] (as of 1 June 2008), terms nos. 22, 37, 46, 52 and 75. Two pairs of terms are identical even as to the name of the trader; thus they are exactly identical.

<sup>76</sup> Consumer Court judgments: of 7 February 2005 in case XVII Amc 108/03, *Prezes UOKiK v. Oasis Tours*, MSiG 2006/243/15393; of 22 August 2005 in case XVII Ama 21/05, *Kredyt Bank v. Prezes UOKiK*, Dz.Urz.UOKiK 2005/3/45, *Wokanda* 2006/5/52. In the latter judgment we read:

The view that the application of an abusive clause entered into the register of forbidden clauses on the basis of a judgment pronounced against a different operator is forbidden also *vis-à-vis* other operators is wrong. First of all, those judgments forbid the application of the aforementioned terms of a model contract only *vis-à-vis* a concrete operator. Secondly, the declaration of abusiveness occurs in the context of the entire model and with regard to the legal relationships that it regulates.

operator could invoke the entering of the standard term into the Register of Unfair Terms *vis-à-vis* that operator.

However, stating that Polish scholars and judges have been resisting the abstract review of unfair terms *en masse* certainly would not do justice to Polish legal culture. It must therefore be emphasised that from the outset there were also scholars who advocated a pro-Community interpretation of the Polish transposing measures. Thus, E. Łętowska can be viewed as a pioneer in countering anti-European resistance strategies. In her commentary on the Consumer Protection Act 2000 she emphatically endorsed the full third-party effects and rejected the reservations of those viewing judgments as a new source of law.<sup>77</sup> A similar position was also adopted by M. Bednarek<sup>78</sup> followed by I. Wesołowska.<sup>79</sup> According to the latter author, the third-party effects of a judgment extend to all natural and legal persons, both economic operators and consumers, and prohibit anyone from including such a term in any standard-form contract;<sup>80</sup> this prohibition extends not only to the literal meaning of the term but also to any other term which effectively employs the same content, albeit expressed in different words.<sup>81</sup>

The pro-Community interpretation endorsing full third-party effects gained the support of the Office for the Protection of Competition and Consumers (*Urząd Ochrony Konkurencji i Konsumenta*, the Polish administrative agency in charge of competition law and consumer protection, hereinafter referred to as the 'Consumer Office'). The Consumer Office thus interpreted the third-party effects of a judgment condemning unfair terms as extending to all economic operators (but not to all natural and legal persons) and to terms which, despite having a different wording, had the same actual content (the same meaning). This situation led to a clash between the views of the Consumer Office on the one hand (supporting a pro-Community interpretation) and the Consumer Court on the other hand (resisting the third-party effects). Thanks to the fact that judgments of the Consumer Court may be attacked before the Supreme Court, it was the latter jurisdiction's task to resolve the dispute between the administrative agency and the specialised court in charge of consumer protection.

It was in its judgment of 13 July 2006<sup>82</sup> that the Supreme Court finally gave its support to the pro-Community interpretation. The highest

<sup>77</sup> Łętowska, *Ochrona*, 173. <sup>78</sup> Bednarek, *Wzorce*, 218.

<sup>79</sup> Wesołowska, 'Niedozwolone', 199. <sup>80</sup> *Ibid.*, 203. <sup>81</sup> *Ibid.*

<sup>82</sup> Case III SZP 3/06, *Towarzystwo Finansowo-Inwestycyjne Spółka z o.o. v. Prezes UOKiK* [2006] 3–4 *Transformacje Prawa Prywatnego* 113.

judges of the country referred in their decision to the relevant Community instruments, treating them as a guideline for the construction of the national transposing measures. The Supreme Court judges rejected the approach of the Consumer Court and advocated a wide understanding of the third-party effects of judgments condemning unfair terms and entering them in the Register. According to the Supreme Court's judgment, a standard term entered into the Register is not only prohibited *vis-à-vis* the same economic operator but also *vis-à-vis* other operators. This also includes situations where an economic operator uses a similar term having the same practical consequences, even if it is not literally identical. The Supreme Court elucidated that its ruling represented a *praeter legem* interpretation of the Polish transposing measures, which was nevertheless justified in light of Poland's EU obligations as interpreted by the European Court of Justice. It should be pointed out that in rejecting the case law of the Consumer Court, the Supreme Court condemned it for not having taken any account of EU law, and specifically for not having fulfilled the duty of taking into account the Injunctions Directive and the Unfair Terms Directive when interpreting national measures. The Supreme Court explicitly referred to the EU legal order as the justification for its approach and *praeter legem* interpretation giving full effect to the directives.

### Conclusions

The implementation of the Unfair Terms Directive in Poland has led to a clash of two legal cultures: the (Western) European legal culture and the post-socialist (post-communist) legal culture in Poland. I decided to analyse this clash by referring to two specific areas: the general prohibition of unfairness with its general clause of *bona fides* and the abstract control of unfair terms and the third-party effects of judgments issued as a result of such control. In both areas I identified a certain degree of resistance towards the novelties of the EU instrument; the resistance was identified at all three levels of legal culture – legislation, scholarship and adjudication. I do not wish to argue that the resistance towards the Unfair Terms Directive in Poland is an isolated case; I am fully aware of the difficulties that this directive has faced in other Member States, including the 'old' Member States of the Western part of the Union. However, in my chapter I have tried to show that at least some of the arguments and methods of resistance could in one way or another be linked to the peculiarities of Polish legal culture and specifically its

state-socialist heritage. Resorting to a post-socialist general clause (the 'principles of social coexistence') instead of the directive's 'good faith' clause is one example. The resistance towards third-party effects for fear of judicial law-making (condemned by state-socialist legal scholarship) is another. Remaining fully aware that resistance towards certain elements of the *acquis communautaire* among the actors of national legal cultures is by no means a Polish idiosyncrasy, I wished to draw attention to some specific aspects of that resistance which seem to be linked to certain state-socialist characteristics still present in Polish legal culture.