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**The Institutional Implications of the Unfair Terms Directive in Poland**

Rafał Mańko



## 1 Introduction\*

In this chapter I will focus on the institutional implications of the Unfair Terms Directive<sup>1</sup> in Poland in the broader context of the welfare state model prevalent in that member state. I depart from the assumption that there is, in principle, a link between the intensity of the welfare state and the level of consumer protection, as evidenced e.g. by the traditionally high level of both in the Nordic countries.<sup>2</sup> Such a view is supported by the fact that both policies are the expression of the desire to promote social justice.<sup>3</sup> Hence, I will argue that there is a close link between the atrophy of the welfare state in Poland and stances towards consumer protection. Therefore, in section 2, I will depart from a brief account of the evolution of the Polish welfare state from the pre-1989 state-socialist model to the current model which can be described on a theoretical plane as marginal or residual, if not simply atrophic. In section 3, I will discuss the evolution of consumer protection in Poland, indicating its initial lack during the state-socialist period and its emergence in the early 1980s, before moving on to the post-socialist period and the impact of European integration. Having presented the background information on the welfare state and consumer protection, in section 4 I will discuss in detail the institutional impact of the Unfair Terms Directive. My analysis will encompass such aspects as the definition of a consumer, the substantive scope of protection and the available means of protection (incidental and abstract control). I will also discuss the newly introduced group actions (comparable to class actions) which are specifically tailored for consumer cases, including those where the rules on unfair terms are involved. In section 5, I will present my concluding remarks.

## 2 Poland and the Welfare State

Welfare state models tend to be deeply rooted in the institutional framework of each country and their traditions often go back to the 19th and early 20th century or even deeper.<sup>4</sup> However, the traditions of the Polish model are much shorter and are characterised by rather abrupt changes. It ought to be recalled in this context that the modern Polish state emerged only in 1918 and that it radically changed its political system three times during the last century: after a relatively short time as a parliamentary democracy (1921-1926) it was ruled by authoritarian regimes, first as a result of an internal military coup (1926-1939) and later, as a result of the outcome of World War II and the imposi-

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\* The views expressed in this paper are exclusively those of the author and should not be attributed to the Court of Justice of the European Union.

<sup>1</sup> Directive 93/13 on unfair terms in consumer contracts OJ 1993, L 95/29.

<sup>2</sup> See e.g. Bernitz (1976), p. 13; Bernitz (2000), p. 15.

<sup>3</sup> See e.g. Collins (2007), pp. 159-160.

<sup>4</sup> See e.g. Scharf (2005), p. 61.

tion of Soviet-fashioned state socialism (1944-1989). It was only in 1989 that the country reverted once again to democratic capitalism.

Prior to World War II, the newly independent Polish state belonged to the peripheries of the capitalist world<sup>5</sup> with an underdeveloped economy dominated by agriculture<sup>6</sup> and one of the poorest societies in Europe.<sup>7</sup> The social structure revealed enormous disparities with a large proportion of the working class living far below the level of subsistence considered minimal in Western European countries,<sup>8</sup> suffering not only poverty but even famine.<sup>9</sup> Thus, the point of departure for building a welfare state and, in further perspective, an effective system of consumer protection, was radically different than in countries belonging to the capitalist centre. One cannot really say that pre-War Poland attempted to build a welfare state. The regulations introduced during that period were concerned with basic labour law standards (working hours, right to holidays etc.) but did not, however, encompass any measures aimed at the active promotion of social justice through the redistribution of wealth.<sup>10</sup> And even these meagre instruments were gradually withdrawn by the authoritarian regime in the 1930s.<sup>11</sup>

The situation changed radically after World War II when Poland became a state-socialist country in the sphere of Soviet domination. The consequences of the second world war were catastrophic for Poland in social and economic terms: the country suffered one of the greatest damages, exceeding even those of defeated Germany.<sup>12</sup> The starting point for the new, pro-Soviet government was therefore extremely difficult. Nevertheless, inspired by the Beveridge Plan,<sup>13</sup> they embarked upon an ambitious project of building a socialist welfare state based on an egalitarian distribution of wealth through wages,<sup>14</sup> taxation<sup>15</sup> and social benefits,<sup>16</sup> extensive public services offered for free (e.g. education<sup>17</sup> and health<sup>18</sup>) or heavily subsidised (e.g. transportation and culture), guaranteed full employment<sup>19</sup> and conducted an active housing policy. A society hitherto based on acute inequalities was transformed into an egalitarian one, where the level of wealth

<sup>5</sup> Majmurek (2010), p. 72.

<sup>6</sup> Ciborowski & Konat (2010), p. 18.

<sup>7</sup> Kostrowicka et al. (1984), pp. 364-366.

<sup>8</sup> *Ibid.*, pp. 317-320; pp. 327-330.

<sup>9</sup> Ciborowski & Konat (2010), p. 21.

<sup>10</sup> Cf Piątek (2005), pp. 284-285.

<sup>11</sup> *Ibid.* p. 285.

<sup>12</sup> Kostrowicka et al. (1984), p. 451.

<sup>13</sup> Świątkowski (2010), p. 22.

<sup>14</sup> Zalewa (2008), p. 66.

<sup>15</sup> Reniger (1955), pp. 366-367, pp. 416-417.

<sup>16</sup> Grodek (1996), pp. 225-226.

<sup>17</sup> Article 61 of the Constitution of the Polish People's Republic of 22 July 1952.

<sup>18</sup> Majmurek & Szumlewicz (2010), p. 35. See also Article 60(1) of the Constitution 1952.

<sup>19</sup> Grodek (1996), pp. 217-218; Majmurek & Szumlewicz (2010), p. 33.

and income,<sup>20</sup> as well as the actual lifestyle of physical workers was similar to that of white-collar employees.<sup>21</sup> However, the overall level of welfare, even if equally distributed, was relatively low. Świątkowski explained it by the fact that the state-socialist idea

‘was to move forward the whole society *en masse* and at the same time. ... [T]his idea was transposed into the state’s ambition to fulfil the needs of all members of the socialist society and to provide them with social security benefits. ... [A]t a minimum level, all citizens were provided with some kind of social security benefits.’<sup>22</sup>

Another downside of the system for consumers was the domination of heavy (especially military) industry over consumer industry and the precedence of accumulation over consumption.<sup>23</sup> This had tangible results for the (difficult) availability and (low) quality of consumer goods on the market.

The transformation from state socialism to democratic capitalism, which occurred essentially between 1988 and 1991, brought about a complete change of the political and economic context of any welfare state policy. The neoliberal paradigm embraced by the government emphasized private property and privatisation, economic deregulation and personal responsibility rather than solidarity, social justice or welfarism. Critics speak even of a ‘socio-economic anti-policy’ pursued by the subsequent post-socialist governments.<sup>24</sup> Hardy indicated that all the post-1990 reforms, regardless whether executed by the left or right:

‘... have been marked by drastic budget cuts and reduced welfare, and accompanied by decentralisation of state responsibility for social and family policy. ... Restricting access to benefits, cutting public spending and the drive towards flexible labour markets are a way of trying to impose discipline on labour.’<sup>25</sup>

A critic of the neoliberal policies, Szumlewicz, indicated that:

‘The transformation has led to ... an instant drop in the number of constructed apartments, a significant drop in the number of libraries and cultural centres, an enormous drop in the number of pre-schools and nurseries, a massive increase in the number of suicides, alcoholism and prostitution. Massive pauperisation, social exclusion of hundreds of thousands of people, lack of jobs and life perspectives, segregation in education, underfinancing of culture ....’<sup>26</sup>

<sup>20</sup> Grodek (1996), 224; Świątkowski (2010), p. 22.

<sup>21</sup> Majmurek & Szumlewicz (2010), pp. 34-35.

<sup>22</sup> Świątkowski (2010), p. 25.

<sup>23</sup> Hardy (2009), pp. 14-16.

<sup>24</sup> Konat (2009).

<sup>25</sup> Hardy (2009), p. 115.

<sup>26</sup> Szumlewicz (2011), p. 6.

As a matter of fact, the subsequent post-1989 governments reduced the welfare state to a minimum. The country has a significant, structural unemployment<sup>27</sup> coupled with deteriorated conditions of labour, including in-work poverty<sup>28</sup> and precarious work under contracts outside the scope of protection offered by labour law.<sup>29</sup> Public services such as healthcare and education are underfinanced<sup>30</sup> and are gradually undergoing commercialisation and privatisation.<sup>31</sup> This has had the consequence of depriving whole social groups from effective healthcare.<sup>32</sup> Pensions and social benefits are kept at a low level. The taxation system does not have redistributive aims. All this has resulted in an explosion of social inequalities, as evidenced e.g. by the Gini index which amounts for Poland to 0,305 (after taxes and transfers), making it one of the least egalitarian EU/EEA member states (only 6 EU/EEA countries have a higher Gini index, whereas the remaining 17 have a lower Gini index, including almost all of the other former state-socialist countries save for Estonia).<sup>33</sup>

An acute example of the Polish welfare state in practice is the formally existent social housing. In many communes it takes extreme forms: persons not being able to afford to pay for their housing are ejected to commune-built tinware huts where they suffer from cold temperatures and overcrowding, which results in diseases and even casualties.<sup>34</sup>

### 3 Consumer Protection in Poland

Consumer protection is not an area of law and policy that exists on its own. On the contrary, the impact of socio-economic infrastructure and the corresponding political and legal superstructure, with particular emphasis on the welfare state, is immense.<sup>35</sup> The idea of consumer protection started to emerge in the West only in the 1960s<sup>36</sup> and the first consumer regulations started to appear in the 1970s, with Scandinavian countries as the pioneers.<sup>37</sup> State-socialist Poland was not far behind: Polish legal scholars were discussing issues of consumer protection from the 1970s onwards and the legal instruments aiming specifically at consumer protection were enacted as early as in

<sup>27</sup> Konat (2009), p. 35; Szumlewicz (2011), p. 6.

<sup>28</sup> Hardy (2009), p. 122.

<sup>29</sup> *Ibid.*, pp. 123-124.

<sup>30</sup> Konat (2009), p. 38.

<sup>31</sup> See e.g. ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej [Act of 15 April 2011 on Medical Activity] (Dz.U. No. 112, item 654).

<sup>32</sup> Konat (2009), p. 38.

<sup>33</sup> <http://stats.oecd.org/Index.aspx?QueryId=26067&Lang=en> (last accessed 4/2/2011).

<sup>34</sup> Urbański (2010).

<sup>35</sup> Cf Reifner (2007), pp. 330-331.

<sup>36</sup> Łętowska (2002), p. 3.

<sup>37</sup> See e.g. Bernitz (1973), p. 13.

1983.<sup>38</sup> The rules of the Polish consumer law of this period were closely linked to the reality of economic relationships between consumers and socialised enterprises of the time, especially the prevalence of demand over offer in retail commerce.<sup>39</sup> It has to be borne in mind that since the 1970s, the economic conditions were unfavourable to Poland which, increasingly integrated with capitalist economy as a result of loans from Western banks,<sup>40</sup> heavily felt the impact of a crisis in Western markets and plunged into a debt spiral.<sup>41</sup> A visible impact of the economic crisis upon the supply of consumer goods was the introduction of rationing (coupons) in 1976,<sup>42</sup> for the first time since the post-War period. Starting with sugar and meat, rationing eventually was extended to almost all basic consumer goods from shoes to cigarettes. The government's main concern was export as a source of revenue necessary to repay the country's debts; conversely, the quality of goods produced for the domestic consumer market was not a priority and as a result domestic consumer goods were scarce and of poor quality.<sup>43</sup>

Therefore, the first body of Polish consumer law, developed in the midst of the national debt crisis of the early 1980s, placed an emphasis on protection against low quality of goods (warranty, guarantee), afforded consumers a standard 5-day cooling off period and encompassed rights and remedies specific to the context of permanent shortages and long queues.<sup>44</sup> Context-specific rules than can be pointed to, included the duty of the retail shop to actually sell the goods present in the shop, within the limits of normal consumer needs,<sup>45</sup> the right of the consumer to choose exactly which good he wants<sup>46</sup> (important when many new goods are faulty) or the right to be served by a retail shop in the order of arrival<sup>47</sup> (important when long queuing is a rule) or the prohibition of sale

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<sup>38</sup> See e.g. Łętowska (1978). Uchwała Nr 71 Rady Ministrów z dnia 13 czerwca 1983 r. w sprawie ogólnych warunków umów sprzedaży detalicznej towarów oraz ogólnych warunków gwarancyjnych dotyczących towarów trwałego użytku, sprzedawanych przez jednostki handlu uspołecznionego [Resolution No. 71 of the Council of Ministers of 13 June 1983 regarding the General Terms of Contracts of Retail Sale of Goods and General Terms of Warranty of Durable Goods Sold by Units of Socialised Economy] (Monitor Polski No. 21, item 118, hereinafter 'General Terms 1983'); rozporządzenie Ministra Handlu Wewnętrznego i Usług z dnia 14 lutego 1983 r. w sprawie zasad sprzedaży towarów w jednostkach handlu detalicznego oraz placówkach gastronomicznych [Regulation of the Minister of Internal Commerce and Services of 14 February 1983 regarding the principles of sale of goods at units of retail commerce and restaurants] (Dziennik Ustaw PRL No. 8, item 46, hereinafter: Sales Principles 1983).

<sup>39</sup> Łętowska (2002), p. 5.

<sup>40</sup> Binns (2003), p. 97.

<sup>41</sup> Skodlarski (2007), p. 481; Harman (2008), p. 590.

<sup>42</sup> Skodlarski (2007), p. 491.

<sup>43</sup> Łętowska (2002), p. 5.

<sup>44</sup> § 12 ff, § 24 ff, § 11 General Terms 1983.

<sup>45</sup> § 6(2) General Terms 1983; § 3(2) Sales Principles 1983.

<sup>46</sup> § 9(1) General Terms 1983.

<sup>47</sup> § 8(1) Sales Principles 1983.

outside the retail premises, e.g. in the stock room<sup>48</sup> (in order to avoid the clandestine sale of deficit goods only to selected consumers). On the contrary, due to the aforementioned prevalence of demand over offer, the active consumer (seeking goods) did not require protection from the (passive) trader in such areas as door-to-door sales or misleading advertising simply because such phenomena were non-existent or marginal.<sup>49</sup>

However, despite these positive trends in consumer protection during the 1980s one should also point the problem of the mentality of judges who felt uneasy about protecting consumers in their relationship with units of socialised economy, automatically assuming that what was beneficial for a unit of socialised economy was beneficial for the society at large, hence was also beneficial to the individual.<sup>50</sup>

After 1990, when the new government embraced neoliberal socio-economic policies, the situation of consumers – from the angle of the legal standards of protection – initially only deteriorated.<sup>51</sup> The market situation switched to a prevalence of offer over demand and new risks for consumers emerged with the development of private businesses.<sup>52</sup> Consumer protection, which began only to evolve in the last decade of state socialism, was certainly not on the top of the agenda of the neoliberal reformers building democratic capitalism in Poland. There seems to be a close link between the atrophy of the welfare state in post-1990 Poland and the lack of actual initiatives to create an effective system of consumer protection. A ruling class which does not treat the promotion of social justice as its priority does not tend to be interested in promoting substantive fairness in consumer contract law. Łętowska pointed out that judges and prosecutors, as well as legislators, and even the legal community at large, embraced the principle *volenti non fit iniuria* (he who wants does not suffer any damage) and did not acknowledge the necessity of protecting consumers due to their alleged voluntary participation in transactions with traders.<sup>53</sup> According to the same author, judges, when acting as consumers, did not see anything wrong in anti-consumer practices and they applied the same approach when adjudicating.<sup>54</sup>

Against such a background, it seems therefore that inspiration to enact pro-consumer legislation came from Brussels and was first and foremost a consequence of Poland's aspiration to EU membership. Although Poland's accession to the EU took place only 15 years after the beginning of the transition from state socialism to democratic capitalism, the new post-socialist government clearly placed European integration as its strategic priority right from the early 1990s.

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<sup>48</sup> § 6 Sales Principles 1983.

<sup>49</sup> Łętowska (2002), p. 5.

<sup>50</sup> *Ibid.*, pp. 2-3.

<sup>51</sup> *Ibid.*, p. 5.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, p. 8.

<sup>54</sup> *Ibid.*, p. 7.

As early as 1991, Poland signed an association agreement with the Communities, preparing the ground for the future accession and imposing upon Poland the obligation to approximate its legal system to Community law.<sup>55</sup> After discarding the alternatives, such as a Consumer Code modelled on France, the Polish legislature eventually decided to follow a two-way implementation path with regard to the consumer *acquis*. Directives covering matters already present in the Civil Code were to be implemented within it, whereas the remaining ones were to be transposed in separate statutes.<sup>56</sup> Because there had been provisions on standard terms in the Civil Code, the Unfair Terms Directive was implemented in its entirety within the Code, including the somewhat lengthy list of terms presumed to be unfair.

The stance of the Commission for the Codification of Civil Law (a government-appointed drafting body) with regard to the philosophy of implementation reveals a close connection between the atrophy of the welfare state and the limping consumer protection: the Commission advised to limit implementation to the minimum level provided for by directives and rejected the extension of consumer rights beyond that.<sup>57</sup> This was evidenced e.g. in the limiting of the definition of consumer to the minimum standard required by the Unfair Terms Directive (see section 4.4.1 below) or the abolition of the general cooling-off period existing under the 1983 regulation and its limitation to doorstep and distance selling, as required by the *acquis*.

## 4 Implications of the Unfair Terms Directive

### 4.1 Introduction

In the following sections, with view of avoiding repetition and excessive cross-references, I will present my analysis of the impact of the Unfair Terms Directive not according to the institutions involved (courts, public administration, consumer organizations) but according to the scope and forms of protection. Hence I will first analyse the definition of the consumer as the basis of the scope *ratione personae* of the protection (section 4.2), then I will discuss the definition of an unfair term as determining the scope *ratione materiae* of the protection (section 4.3) and the effects of the list of unfair terms (section 4.4), before moving to the forms of protection afforded under Polish law: the incidental control of unfair terms, initiated by consumers themselves and performed

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<sup>55</sup> Mańko (2012), pp. 415-416 with further references.

<sup>56</sup> *Ibid.*, p. 418 with further references.

<sup>57</sup> Projekt ustawy o umowach zawieranych poza lokalem przedsiębiorstwa lub na odległość oraz o zmianie przepisów kodeksu cywilnego, kodeksu postępowania cywilnego i kodeksu wykroczeń dotyczącej niedozwolonych postanowień umownych i ich kontroli oraz odpowiedzialności za produkt o właściwościach niebezpiecznych [Draft Doorstep and Distance Contracts Act 1998], 7:2 (1998) *Kwartalnik Prawa Prywatnego* p. 341, 351.

by ordinary courts (section 4.5), abstract control of unfair terms performed by a specialised court under supervision of the Supreme Court (section 4.6) and the newly introduced class actions which are applicable inter alia in consumer cases and can be seen as a form of implementation of the Unfair Terms Directive (section 4.7).

#### 4.2 Scope *Ratione Personae* of Protection: the Definition of Consumer Made Narrow

The tradition of defining the notion of a consumer may be traced back to socialist legal culture. At that time, there was merely a scholarly definition, covering both natural and legal persons; the decisive criterion was the non-commercial purpose of the transaction by the consumer. This model was assumed by the legislator in the post-socialist period and in 1995 the first Polish statutory definition of a consumer included both natural and legal persons.

The definition of a consumer in European directives as a rule only extends to natural persons. In the case of most directives, providing only for minimum harmonisation, member states are free to expand the definition of a consumer so as to include legal persons. As a matter of fact, Poland utilised this option when implementing the Unfair Terms Directive in 2000 and a consumer was defined in the following terms (Art. 384<sup>3</sup> CC):

‘A consumer shall be deemed to be a person who concludes a contract with a trader for a purpose not connected directly to economic activity’.

This horizontal definition was broad and included legal persons acting for non-commercial purposes, together with so-called legal subjects lacking legal personality such as housing communities. Furthermore, commercial legal persons and legal subjects lacking legal personality could fall within this definition of a consumer, provided the transaction fell outside the scope of their economic activity such as where a transaction involved a company which conducted only cultural, educational or charitable activities.

In 2003, three years following the implementation of the Unfair Terms Directive, the Polish legislator decided to modify the definition of a consumer. The old definition contained in Book III of the Code was repealed and a new one was inserted in Book I. The new definition explicitly excluded legal persons from its scope (Art. 22<sup>1</sup> CC):

‘A consumer shall be deemed to be a natural person performing a juridical act unconnected directly to their economic or professional activity.’

The new definition, in line with the Directives, includes not only economic activity (trade) but also professional activity.

Nevertheless, one should mention here that the draft book one of the Polish Civil Code<sup>58</sup> seeks to award consumer protection also to small traders who enter into transactions with other traders, acting in a consumer-like manner. This, however, is done only by way of a default rule. Article 56 of the Draft Civil Code (Book One) provides that:

‘Consumer protection is awarded also to a minor trader who acquires goods or services from another trader according to principles applied to consumers; the parties, may, however, exclude such protection in a contract.’

The scope of the notion of consumer as a person protected by mandatory rules remains, therefore, unchanged (Article 55 of the Draft Civil Code [Book One]). The solution contained in the draft book seems to be a compromise between various tendencies within the Codification Commission.

In my opinion, the narrowing of the definition of a consumer for the purposes of Polish consumer law is directly related to the Polish legislator’s concerns that Polish law might become too consumer-friendly and, consequently, harmful to Polish businesses. Such concerns were raised, for example, by Podrecki and Zoll who both expressed the view that exceeding the minimum European standards of consumer protection ‘might have negative consequences for the competitiveness of Polish economy’.<sup>59</sup> This militates in favour of my argument that there is indeed a close link between the welfare state model (neoliberal, residual) adopted and the consumer policy pursued by the government. The underlying ideological premises have similar consequences in both spheres.

### 4.3 Scope *Ratione Materiae* of Protection

The scope *ratione materiae* of protection against unfair terms is determined by three elements. First of all, by the definition of a standard form contract. Secondly, by the definition of the main subject-matter of the contract treated as an exclusion to unfair terms protection. Thirdly, by the definition of unfairness. In general, the Polish legislature implemented the appropriate rules from the directive; hence there is no need of discussing them at length here. The only aspect I would like to draw attention to is the definition of unfairness which departs from the definition contained in the directive and could be construed in a way less favourable to consumers. In its famous and oft-discussed formulation, Article 3(1) of the Unfair Terms Directive defines unfair terms as those which ‘contrary to the requirement of good faith, ... caus[e] a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer’. The Polish legislature defined unfair terms as

<sup>58</sup> Księga pierwsza kodeksu cywilnego. Projekt z uzasadnieniem [Book One of the Civil Code. Draft with Motives] (Warszawa: C.H. Beck, 2009).

<sup>59</sup> Podrecki and Zoll (2008).

those which ‘shape [the consumer’s] rights and duties in a manner contrary to good customs and grossly violate his interests’.<sup>60</sup> Three elements are potentially problematic in this definition.<sup>61</sup> First of all, are good customs (*boni mores*, *gute Sitten*) the same as good faith (*bona fides*, *Treu und Glauben*) or do they represent a different (lower) standard? Secondly, is a gross violation [of the consumer’s] interests standard identical to the significant imbalance contained in the Directive, or is it perhaps a lower standard, more lenient to the trader? Thirdly, ought a term to be to be simultaneously immoral (against good customs) and constitute a gross violation of the consumer’s interests in order to be declared unfair? Does that not depart – to the detriment of the consumer – from the minimum standard of the Directive?

As with any vague expressions used by the legislature, various scholarly and judicial interpretations are possible. According to Pilich, good faith and immorality (*contra bonos mores*) are different standards of evaluation which, in his opinion, means that the standard in the Polish Civil Code (*boni mores*) is more lenient to the trader than the standard contained in the Directive (*bona fides*).<sup>62</sup> The same scholar also points to the difference between significant imbalance and gross violation of the consumer’s interests and arrives at the same conclusion, namely that the Polish implementing measure does not meet the minimum set by the Directive.<sup>63</sup> Łętowska, on the contrary, treats general clauses (*Generalklauseln*) as open norms and points out, in the spirit of legal realism, that at the end of the day everything depends on the judge rather than on the linguistic formulation of a general clause.<sup>64</sup> In practice, courts quite often equate the new general clause (*boni mores*) with the old state-socialist clause of principles of social coexistence, using the terms and doctrines more or less interchangeably.<sup>65</sup> This has met with support of some scholars, who, like Skory, are of the opinion that *boni mores* and principles of social coexistence are ‘similar, or even identical’.<sup>66</sup>

As to the relationship between the violation of *boni mores* and the gross violation of the consumer’s interests, early case-law treated them as two separate prongs of the test that both need to be fulfilled.<sup>67</sup> This gained support from certain scholars, including Skory and Popiołek.<sup>68</sup> However, such an interpretation departs – to the detriment of the consumer – from the minimum standard of the Unfair Terms Directive.<sup>69</sup>

<sup>60</sup> Article 385<sup>1</sup> § 1 sentence 1. Translation after Mańko (2012), 420. Emphasis added.

<sup>61</sup> Mańko (2012), pp. 419-427.

<sup>62</sup> Pilich (2008), p. 178.

<sup>63</sup> *Ibid.*, p. 179.

<sup>64</sup> Łętowska (2002), p. 340.

<sup>65</sup> Mańko (2012), p. 424 with examples.

<sup>66</sup> Skory (2005), p. 154. See also Bednarek (2005), p. 180.

<sup>67</sup> Supreme Court decision of 6 April 2004, Case I CK 472/03, LEX no. 125052. Cf Mańko (2012), p. 425.

<sup>68</sup> Popiołek (2005), p. 987; Skory (2005), p. 177.

<sup>69</sup> Mańko (2012), p. 426.

An attempt to change those negative trends in the interpretation of the Polish implementing measures were made by the Supreme Court in its decision of 3 February 2006,<sup>70</sup> where the extravagancies of the Polish conceptual framework (immorality, gross violation) were linked up to the concepts used by the directive (good faith, significant imbalance). The Court underlined especially the element of an imbalance between the rights and duties of the consumer and trader under the standard form contract, an element which is absent in the literal text of the Polish implementing measure.

#### 4.4 List of Unfair Terms: Gray not Black

The list of unfair terms has been implemented within the Civil Code. The Polish legislator did not decide to create a black list of unfair terms which are always prohibited and a grey list of terms which are presumed to be unfair unless the contrary is proved. The Polish Civil Code contains only one list. The opening (introductory) phrase contained at the beginning of the list states that the terms on the list ought to be regarded as unfair 'in case of doubt'. Lower courts have understood this as a presumption of unfairness, allowing to rule that a term in a standard contract which corresponds with the list is unfair unless something contrary is proven by the trader. Undoubtedly, this approach would have strengthened the protection afforded to consumers. As Łętowska pointed out, Polish courts are neither keen on applying general terms nor do they have expertise in this field. Hence, a mechanical application of the list would be of great help to consumers in a situation where lower courts have difficulties in applying the general prohibition. However, the Supreme Court in its judgment of 11 October 2007,<sup>71</sup> invoking *Commission v Sweden*<sup>72</sup> ruled that the list does not create any presumption of unfairness and even if a term coincides with a term on the list, it still must undergo a scrutiny against the general standard of unfairness. However, the Polish Supreme Court's reliance upon *Commission v Sweden* is doubtful. Whereas it is true that the ECJ ruled that the Annex to the directive is not a black list, it simultaneously added that the list may be the object of 'more restrictive formulations' in national law. Furthermore, the facts of *Commission v Sweden* case turned on the alleged incorrect implementation of the Directive in that member state. The infringement was to consist in the non-reproduction of the list in Swedish law. The ECJ ruled in favour of Sweden and was looking for arguments to support its decision; hence it wanted to downplay the role of the directive's annex in order to dismiss the Commission's arguments. The Polish Supreme Court could not, in my opinion, legitimately invoke *Commission v Sweden* in order to support an interpretation of the Polish implementing legislation. This is because the Unfair Terms Directive provides only for minimum harmonization and that the ECJ in its judgment actually pointed

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<sup>70</sup> Case I CK 297/2005, LEX no. 179741.

<sup>71</sup> Case III SK 19/07, LEX no. 496411.

<sup>72</sup> Case C-478/99 *Commission v Sweden* [2002] ECR I-4147.

out that a ‘more restrictive formulation’ in national law, i.e. such that makes the list black or grey, is compatible with Community law. Taking into account that the Polish legislation uses ambiguous terms (‘in case of doubt’) which could easily be interpreted as a presumption of unfairness, the Supreme Court’s ruling comes as a reduction of the possible enlarged scope of protection afforded to consumers in this aspect.

#### 4.5 Incidental Review of Unfair Terms by Ordinary Courts

The incidental review of unfair terms occurring in contractual relationships between traders and consumers is a duty of the ordinary civil courts. There is no specific procedure for that. According to the case law of the ECJ, national courts are expected to rule on the unfairness of such terms *ex officio*. As to the sanction that the courts should apply, there is disagreement among scholars. Whereas the implementing provisions in the Civil Code repeat the vague formulation of the Directive (not binding),<sup>73</sup> the possible interpretations under national law include ineffectiveness, voidability and voidness. In its resolution of 13 July 2006<sup>74</sup> the Supreme Court ruled that unfair terms already condemned by the Consumer Court in the course of abstract review (see section 4.6 below) should be regarded as void by the lower courts (under Article 58 of the Civil Code which states that legal acts contrary to the law are void). The same principle could apply to terms controlled incidentally. However, according to most scholars unfair terms, at least subject to incidental review, are ineffective and not void.<sup>75</sup> It would be desirable that the Polish legislature make a more precise indication in this respect, e.g. introducing voidness as in Article L. 211-2(1) of the new Luxembourg Consumer Code or clearly opting for ineffectiveness as in § 307(1) BGB.

#### 4.6 Abstract Review of Unfair Terms by the Consumer Court

The institutional arrangements for the abstract control of unfair terms provide, on the one hand, a broad spectrum of potential plaintiffs vested with *locus standi* (consumers, organizations, public bodies), and, on the other hand, a specialised court for the whole country, adjudicating under the supervision of two higher courts. The legislature was generous in granting *locus standi* in abstract control cases, encompassing: (i) any person who, in the light of the defendant’s offer, may have entered into a contract containing an unfair term; (ii) a Polish consumer organization; a consumer organization from another EU member state seeking to protect consumer interests in that state, providing it is appropriately registered in Poland; (iii) a district or town

<sup>73</sup> Article 385<sup>2</sup> § 1 of the Civil Code 1964.

<sup>74</sup> Case III SZP 3/06, LEX no. 197804.

<sup>75</sup> Żuławska (2003), p. 138; Wieczorek (2010), ad Article 385<sup>1</sup> CC, para. IV; Olejniczak (2010), ad Article 385<sup>1</sup> CC, para. 12.

consumer ombudsperson; (iv) the President of the Competition and Consumers Protection Office; (v) a prosecutor or (vi) the national Ombudsperson.<sup>76</sup> The Insurance Ombudsperson has, however, been denied *locus standi*.<sup>77</sup> Actions may be brought throughout the period of applicability of a standard-form contract containing an unfair term, or within six months of the contract's performance or expiry.<sup>78</sup> The institutional arrangements on the plaintiff side clearly indicate the will of the legislature to grant a wide *locus standi*. First of all, *locus standi* was granted to certain administrative officers, specialised in consumer protection (local consumer ombudspersons, president of the Consumer and Competition Protection Office), defence of fundamental rights (the national Ombudsperson) or protection of the legal order as such (all prosecutors). According to the Supreme Court, the *locus standi* of consumer ombudspersons is based on the public-interest and is not derived from the *locus standi* of specific consumers<sup>79</sup> (as in the group actions discussed below in section 4.7).

Secondly, *locus standi* was granted to the organized civil society (Polish and other EU consumer organizations). Thirdly, it was granted to consumer as such with a broad test consisting in the mere possibility of concluding a contract under the trader's offer, without the need of proving any concrete intent to do so.<sup>80</sup> This allows to classify the action for the declaration of unfairness of a standard term as a true *actio popularis*, brought in the general interest.

As regards the institutional arrangements with regard to the judiciary, the legislature decided to vest exclusive first-instance jurisdiction with regard to abstract review of unfair terms only to one, specialised court – the Consumer and Competition Protection Court in Warsaw (*Sąd Ochrony Konkurencji i Konsumentów*, hereinafter: Consumer and Competition Court). This court is supervised, on points of fact and law, by the Court of Appeal in Warsaw by way of an appeal (*apelacja*)<sup>81</sup> and, on points of law only, by the Supreme Court by way of a cassation (*kasacja*, a public-interest oriented means of challenging judgments which is designed to allow the development of the case-law and is not automatically available in every case).

The third institutional arrangement which ought to be mentioned is the Register of Unfair Terms where all terms condemned by the Consumer Court are entered. The Register is publicly available on-line.<sup>82</sup> As of February 2012, the Register contained 2,800 unfair terms which were condemned between 2002 and 2011.<sup>83</sup> Within the Register, the terms are arranged in chronological order

<sup>76</sup> Article 4793<sup>8</sup> of the Polish Code of Civil Procedure.

<sup>77</sup> Flaga-Gieruszuńska (2006), p. 1405.

<sup>78</sup> Article 47939 Code of Civil Procedure.

<sup>79</sup> Judgment of the Supreme Court of 3 February 2006 in Case I CK 297/05, LEX no. 179741.

<sup>80</sup> Ereciński (2007), p. 555.

<sup>81</sup> *Ibid.*, p. 554.

<sup>82</sup> [http://www.uokik.gov.pl/rejestr\\_klauzul\\_niedozwolonych2.php](http://www.uokik.gov.pl/rejestr_klauzul_niedozwolonych2.php) (last accessed: 7/2/2012).

<sup>83</sup> PDF file downloadable from the website mentioned in the previous footnote, last updated on 23 January 2012.

and indicate the date of the judgment, the case number, the name of the court (Consumer Court, earlier Anti-Monopoly Court), the name of the plaintiff and the defendant trader, the full text of the unfair term, the date of entering into the Register as well as additional remarks. The latter field is usually used to denote the sector of the economy (e.g. real estate, tourism, education, banking, e-commerce, consumer sales) or, sometimes, the specific type of unfairness involved (e.g. Argentinian system). The Consumer Protection Office also offers a search engine which allows for advanced search of the Register. Condemned unfair terms can be searched *inter alia* according to the sector of the economy, names of parties, as well as by way of a full text search with typical operators (AND, OR, NOT, quotation marks).

Two key issues were, however, missing from the institutional layout created by the legislature for the abstract review of unfair terms. The first one is the test of abstract unfairness to be applied by the Consumer and Competition Court and the second one is the extent of the third-party effects of the condemnation of an unfair term.

As regards the test of unfairness, the only test provided for by the legislature is the concrete test of unfairness applicable in the course of incidental control of a concrete contractual relationship; on the contrary, there is no specific test designed by the legislature for abstract review.<sup>84</sup> This allows for four possible solutions.<sup>85</sup> First of all, the Consumer Court could apply the concrete test of unfairness directly (without any modifications).<sup>86</sup> Secondly, it could apply that test *mutatis mutandis*, adapting it to the needs of abstract control. Thirdly, the concrete test could be applied by analogy. Fourthly, the Consumer Court could devise an autonomous test, elaborated for the purposes of abstract control, taking into account its specific character and needs.

The question of the applicable test boils down to the degree of abstractness of abstract review, i.e. to what extent should the Consumer Court take into account the factual matrix. To give an analogy, it is the question whether the Consumer Court should analyse the standard form contract under scrutiny just as the Constitutional Tribunal analyses a statute, i.e. on its own, without any factual circumstances, or whether it should admit some factual circumstances, as it does in incidental review.

The direct application of the test of (incidental) unfairness from the Civil Code inevitably invites the Court to look into the facts of the case, e.g. the commercial policy of the trader, the context of the standard contract in the trader's business, the trader's pricing policy and so forth. In its resolution of 13 July 2006<sup>87</sup> the Supreme Court ruled in favour of a purely abstract control, i.e. the review of the content of the standard contract, not its use by the trader, without

<sup>84</sup> Skory (2005), p. 287 ff; Flaga-Gieruszyńska (2006), p. 1401; Mańko (2012), p. 428.

<sup>85</sup> Cf Mańko (2012), p. 428.

<sup>86</sup> This seems to be the minimum requirement of the Directive. Cf opinion of AG Trstenjak (6 December 2011) in Case C-472/10 *Invitel*, para. 40.

<sup>87</sup> Case III SZP 3/06.

regard to the use of similar terms by other traders and without paying attention to the economic conditions of the trader's activity, its organization or characteristic features.<sup>88</sup> However, in its later case-law the Supreme Court seems to have departed from this line of reasoning. In its judgment of 7 October 2008<sup>89</sup> it actually downplayed the abstractness of the abstract review, emphasising rather its allegedly concrete elements:

'The abstract review of a standard contract cannot lead to the general exclusion of a given term from use in transactions, for the court's duty is to decide a concrete case, concerning a concrete term, contained in a concrete standard contract. A judgment pronounced in such a case is concerned with the term of a specific standard from contract, and not a contractual term in general.'

What is more, in this judgment the Supreme Court went as far as to invoke the rule of incidental control which imposes upon the court the duty to take into account the circumstances of the conclusion of the contract and any other contracts, which are connected to it,<sup>90</sup> therefore limiting the abstract character of the review even more. This line of reasoning was upheld in a more recent judgment of the Supreme Court of 13 May 2010<sup>91</sup> where it ruled that the object of abstract review of unfair terms:

'... is a specific term of a specific standard contract ... The court does not, therefore, perform the review of some abstract possibility of the application of a prohibited term in transactions in the form of a rule as typified as possible ('abstract') but the court reviews only this concrete term of contract which has already been used by a certain operator and against which an action has been filed. The aim of analysing such a demand cannot [consist in] ... the establishment of an abstractly framed prohibition, which would supplement the normative catalogue of prohibited clauses ....'

Of course, it is true that the court called upon to adjudicate on the unfairness of a term contained in a standard contract in the abstract review procedure is not expected to add new terms to the list contained in the Directive or the Civil Code. However, the language used by the Supreme Court since 2008 seems to strip the abstract review of its substance, that is its abstract character, independent of the factual matrix of a given case. This creates the risk of undermining the very utility of the whole procedure for consumers in general, limiting its benefits only to those among them, who have adhered to a given standard contract of a given trader in a given period of time. Whereas indeed in some cases it is possible that the unfairness of term in a standard contract is highly

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<sup>88</sup> Case III SZP 3/06, para. 13.

<sup>89</sup> Case III CZP 80/08, LEX no. 458124.

<sup>90</sup> Article 385<sup>2</sup> of the Civil Code.

<sup>91</sup> Case III SK 29/09, LEX no. 694238.

dependent on circumstances, there are, on the contrary, numerous terms which, by virtue of their very wording, are unfair under all circumstances. Were it not the case, it would have been impossible for various national legislatures across Europe to create black lists of unfair terms,<sup>92</sup> nor would it be possible for the Polish legislature to create any mandatory rules protecting consumers at all. Beyond doubt, among the 2,800 unfair terms entered into the Register of Unfair Terms since 2002 there are many which can be easily judged as unfair regardless of the commercial policy of the trader or the socio-economic context in which they were proposed to consumers.<sup>93</sup>

The judicial restraint demonstrated by the Supreme Court since 2008 allows rogue traders to use the same unfair terms that have already been condemned on numerous occasions in the past and have been entered into dozens of times to the Register of Unfair Terms. Hence, there is no black list of unfair terms in the Polish law and all terms, regardless of the degree of their harmfulness towards the consumer, unfair terms always remain grey and require a fresh analysis by the Consumer Court whenever they are placed in a new standard contract (even by the same trader).

The second aspect which was left open by the drafters of the provisions on the abstract control of unfair terms were the third-party effects of a judgment pronounced in such proceedings.<sup>94</sup> The pertinent legislative rule<sup>95</sup> is drafted in a very succinct manner, thus leaving open the question which third parties are actually bound by which effects of the judgment.<sup>96</sup> There are several possibilities ranging from full third-party effects to very limited third-party effects (restrictive interpretation of the rule). First of all, the third-party effects could encompass all potential consumers and all traders with regard to an identical or similar unfair term. This would be a full-fledged third-party effect, akin to precedent. Secondly, the third party effects could be slightly more limited *ratione materiae*, i.e. encompass only identical (identically formulated) but not similar unfair terms. Thirdly, they could be limited *ratione personae* on the plaintiff side but still have third-party effects on the defendant side (any trader using such a term in the future). Fourthly, there could be no third-party effects on the defendant side (only the defendant who was actually sued would be bound) and extremely limited third-party effects on the plaintiff side (only those consumers who had

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<sup>92</sup> See e.g. § 309 BGB.

<sup>93</sup> See e.g. Register of Unfair Terms, term no. 2752 'The Customer is not allowed to withhold her payment to Komputronik S.A. or set off a claim to that company (...)'; term no. 2760 'The cost of shipment of the good under a warranty claim shall be covered by the buyer'; term no. 2785: 'The online pharmacy aptekawsieci.pl shall not be liable for the imperfections and errors of the IT system', term no. 2786 'The Shop reserves the right to modify the present regulations'.

<sup>94</sup> Cf Case III SZP 3/06, *supra*, para. 14.

<sup>95</sup> Article 4974<sup>3</sup> of the Code of Civil Procedure 1964 merely 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.

<sup>96</sup> Mańko (2012), p. 428.

actually entered into the standard contract containing the condemned unfair term). Given the different scope of authority of the judgment, one could place those options on an axis from fully fledged judicial law-making (option one), through limited judicial law-making (options two and three) to no judicial law-making (option four). Obviously, the widest possible third-party effects of the judgment are in the interest of consumers, creating a binding precedent which can be invoked against any trader who would wish to use a condemned term in the future.<sup>97</sup> Conversely, the limited third-party effects (as in option four) limit the benefits of the proceedings to a relatively narrow group of consumers (only parties to a certain standard contract, e.g. only subscribers of a certain mobile network) and only within a narrowly defined scope of their interest (only *vis-à-vis* a concrete trader, e.g. a mobile network operator). The fourth option seems to assimilate abstract review of unfair terms to a class action.

Scholars have adhered to various options. Skory, Jagielska and Wesołowska expressed the view that the third-party effects are limited only to the defendant and do not cover any other traders.<sup>98</sup> The Competition and Consumer Protection Office adheres to the interpretation that the judgment is binding upon all traders and that traders who continue to use a prohibited term, after its entering into the register, may be fined by the President of that Office for violating collective consumer interests.<sup>99</sup> Conversely, the Competition and Consumer Court in numerous judgments limited the third-party effects of the judgments. For example, in a judgment of 22 August 2005,<sup>100</sup> the Consumer Court dismissed an action brought by the President of Competition and Consumer Protection Office and explicitly rejected her interpretation of third-party effects, ruling that:

‘The view that the application of an unfair term entered into the Register of Unfair Terms 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 only *vis-à-vis* a specific operator. Secondly, unfairness is determined in the context of the entire standard contract and with due regard to the legal relationships regulated in that contract. ... In the opinion of the Court [...] third-party effects [subsist] exclusively with regard to parties having *locus standi* to bring an action for declaration of unfairness of a term of contract against the person against whom such a prohibition has been pronounced.’<sup>101</sup>

The opposite view, based on fully-fledged third-party effects was presented from the outset by Łętowska, who clearly indicated that using terms which were condemned as unfair is, from their entry to the register, prohibited *vis-à-vis* all

<sup>97</sup> *Ibid.*, p. 429.

<sup>98</sup> Skory (2005), p. 306; Jagielska (2005), pp. 95-96; Wesołowska (2004), p. 196.

<sup>99</sup> [http://www.uokik.gov.pl/faq\\_niedozwolone\\_klauzule.php#faq1272](http://www.uokik.gov.pl/faq_niedozwolone_klauzule.php#faq1272) (last accessed 7/2/2012).

<sup>100</sup> Case XVII Ama 21/05, LEX no. 166196.

<sup>101</sup> Translation partly based on: Mańko (2012), p. 430.

parties.<sup>102</sup> A similar view was taken by Ereciński,<sup>103</sup> who explicitly stated that the entering of a term to the Register of Unfair Terms means that it is ‘forbidden in all standard form contracts’.<sup>104</sup>

This view was adopted by the Supreme Court in its resolution of 13 July 2006.<sup>105</sup> After an extensive discussion of EU legislation and case-law, invoking pro-European and functional interpretation of the Polish transposing measures, the Supreme Court ruled that the use of an unfair term, entered into the Register of Unfair Terms, by a different trader is prohibited and may constitute a punishable practice violating the collective interests of consumers.<sup>106</sup> The Court ruled that the third-party effects encompass all consumers and all traders,<sup>107</sup> i.e. adopted the first, most pro-consumer interpretation of the vague and succinct legislative rule. It also ruled that the third-party effects extend not only to the term literally entered into the Register of Unfair Terms<sup>108</sup> but also to terms which are framed in a different linguistic fashion but have the same effects.<sup>109</sup>

However, this pro-European and pro-consumer line of interpretation was soon departed from in the resolution of the Supreme Court of 7 October 2008.<sup>110</sup> The case was decided by a different panel than the resolution of 13 July 2006, discussed above. Since there is no rule of binding precedent in the Polish legal system, the Supreme Court in a different composition ruled in a completely different manner. In the 2008 decision, the Court found that the third-party effects are not binding on other traders. The entering of an unfair term to the Register does not – according to this decision – bind other traders even if they apply literally the same clause.

#### 4.7 Group Actions as a New Procedural Form of Consumer Protection

In 2009 the Polish legislature introduced a new form of procedure in civil cases – the group action.<sup>111</sup> Such actions may be brought in civil cases concerning consumer protection, product liability and tort, save for the protection of the right of personality.<sup>112</sup> With view to this scope, there is not

<sup>102</sup> Łętowska (2001), p. 173.

<sup>103</sup> Ereciński (2007), pp. 557-559.

<sup>104</sup> *Ibid.*, p. 559.

<sup>105</sup> Case III SZP 3/06.

<sup>106</sup> Case III SZP 3/06, operative part.

<sup>107</sup> Case III SZP 3/06, para. 16.

<sup>108</sup> Case III SZP 3/06., para. 15.

<sup>109</sup> Case III SZP 3/06., para. 18. Later confirmed in Supreme Court judgment of 5 June 2007 in Case I CSK 117/07, LEX no. 351189.

<sup>110</sup> Case III CZP 80/08, LEX no. 458124.

<sup>111</sup> Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym [Act of 17 December 2009 on the pursuit of claims in group proceedings] (Dz.U. 2010, No. 4, item 77, hereinafter: Group Actions Act 2009).

<sup>112</sup> Article 1(2) Group Actions Act 2009.

doubt that the group actions fall within the sphere of the Unfair Terms Directive and in particular its Articles 6 and 7 regarding effective enforcement of consumers' rights. The link existing between EU rules on unfair terms, on the one hand, and collective interest actions and group actions in national law, on the other hand, has been strongly emphasised by Advocate General Trstenjak in her recent opinion in *Invitel*.<sup>113</sup> There is no doubt that not only abstract review of unfair terms but also group actions directed against rogue traders using unfair terms fall within the scope of the Directive, ensuring its *effet utile* in the national legal order.

The group action under Polish law is regarded as a legal transplant of the Swedish model.<sup>114</sup> It is an opt-in<sup>115</sup> type of action, with an active role of the representative of the group and a passive role of the group members.<sup>116</sup> The proceedings are divided into distinct phases.<sup>117</sup> In the first, preliminary phase, the court analyses the admissibility of a group action. If it finds it admissible, in the second phase a public announcement is made and persons having the same legal interest may join the group. The court controls the composition of the group and makes a decision as to its final composition which ends the second phase. In the final, third phase, the court analyses the merits of the claim and makes a judgment. If various group members have monetary claims of different value, they have two choices. The first possibility is to standardise the claims into sub-groups (of at least two persons) of those who wish to pursue a claim of the same value (a standardised claim, as opposed to determining its value individually for each plaintiff). The second option, which seems to be better in terms of fairness and effectiveness, is to file the group action only to determine the defendant's liability as such. In that case, after the judgment, each individual group member may sue the defendant for damages without the need of proving liability as such.<sup>118</sup> According to Nieduzak, this possibility will probably be applied frequently, as it facilitates the procedure and eliminates problems connected to the need of standardising claims.<sup>119</sup> The Warsaw City Ombudsman has already brought such an action against a major bank on behalf of 776 consumers.<sup>120</sup>

The group may be represented either by one of the persons having legal interest in the action, i.e. a consumer or a tort victim, or by a local consumer ombudsman.<sup>121</sup> As an exception to the general rules of Polish civil procedure,

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<sup>113</sup> Opinion of 6 December 2011 in Case C-472/10 *Invitel*. At the time when this text was going to the press the opinion was not yet available in English.

<sup>114</sup> Nieduzak (2012), p. 3.

<sup>115</sup> Rejda (2011), pp. 19-20.

<sup>116</sup> Rejda (2011), p. 12; Nieduzak (2012), p. 17.

<sup>117</sup> Rejda (2011), pp. 14-17; Nieduzak (2012), pp 5-6.

<sup>118</sup> Article 2(3) Class Actions Act 2009. Nieduzak (2012), p. 9.

<sup>119</sup> Nieduzak (2012), p. 10.

<sup>120</sup> Nieduzak (2012), p. 10.

<sup>121</sup> Article 4(2) Class Actions Act 2009.

a group action may be filed by neither a prosecutor nor by a social organization, which has been criticized as being incoherent with the whole concept of a group action.<sup>122</sup>

Access to justice is facilitated in that the court fee (which the plaintiff has to pay when bringing the action) is reduced from 5% of the value of the claim to 2%.<sup>123</sup> However, the legislature simultaneously introduced a mechanism intended to block unjustified group actions: upon the defendant's request the court may order the plaintiff to provide security in cash for the defendant's legal costs which may not exceed 20% of the claim or 43,200 PLN (approximately € 10,500), whichever is higher.<sup>124</sup> However, owing to its maximum limit, this security does not, in principle, constitute a barrier in access to justice for consumer groups.<sup>125</sup> A factor facilitating access to justice is the possibility of agreeing on a contingency fee (success fee) with the lawyer representing the group of up to 20% of the damages adjudicated by the court.<sup>126</sup> This is the first time that the Polish law adopts the contingency fee mechanism.<sup>127</sup>

After one year of functioning, the new group actions procedure have caught significant attention of the citizens. As much as 40 group actions were brought, out of which 23 were already decided upon.<sup>128</sup> According to estimates, approximately 70% of group actions are brought against the State Treasury and 30% against businesses.<sup>129</sup> The number of 40 group actions brought during the first year is relatively high (by European standards), especially when compared to Sweden, the country of origin of the legal transfer, where during the first eight years of group actions (2002-2010) only 13 such actions were brought altogether.<sup>130</sup> This data certainly indicates that there is a significant interest in group actions in Poland and by no means can this new legal mechanism be compared to a dead letter of the law. To what extent the group action will actually strengthen consumer protection depends to a large degree on the attitude of the judges, their pro-consumer stance and in particular their activism in managing group proceedings.<sup>131</sup>

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<sup>122</sup> Niedużak (2012), pp. 19-20.

<sup>123</sup> Ustawa z dnia 28 lipca 2005 r. o kosztach sądowych w sprawach cywilnych [Act of 28 July 2005 on legal costs in civil matters] (Dz. U. no. 167, item 1398 with amendments), Article 13 as amended by the Class Actions Act 2009, Article 25.

<sup>124</sup> Niedużak (2012), p. 13 ff.

<sup>125</sup> *Ibid.*, p. 14.

<sup>126</sup> Article 5 Class Actions Act 2009.

<sup>127</sup> Rejda (2011), p. 31.

<sup>128</sup> Niedużak (2012), p. 7.

<sup>129</sup> *Ibid.*, p. 7.

<sup>130</sup> *Ibid.*, p. 15.

<sup>131</sup> Niedużak (2012), p. 21.

## 5 Conclusions

Before 1989 Poland, as a member of the Soviet block, had a state-socialist, egalitarian welfare state, satisfying the basic needs of its society at a moderate level. However, the assumption that what benefits socialised enterprises benefits society at large, coupled with the collectivist assumption that what benefits society at large necessarily benefits all individuals were a major obstacle to the development of consumer protection law. In spite of that, as early as 1983 Poland enacted its first consumer protection regulations, tailored specifically to the needs of the day. Hence, in a market characterised by the prevalence of demand over offer and justified concerns with the quality of consumer goods, the consumer law of the 1980s emphasised the consumer's right to actually purchase goods (in order of appearance in the queue) and to demand their exchange or repair in case of non-conformity. Without active traders, such phenomena as misleading advertising, door-to-door or distance selling were not a problem in those days.

After 1989 the circumstances changed. The new government applied a neoliberal shock therapy and started to build democratic capitalism in a post-socialist environment. The state-socialist welfare state was dismantled. The neoliberal approach, common among the legal elites, became a new obstacle to the development of consumer law. The outdated Roman maxim *volenti non fit iniuria* (he who wants does not suffer damage) was used to dismiss any claims for consumer protection. Were it not for the Polish elites' aspirations to the EU membership, consumer protection would have probably lagged behind far longer. However, in 1991 the Accession Agreement was signed and as from 2000 Poland started to implement the consumer *acquis*. This included also the Unfair Terms Directive.

The general attitude adopted by the legislature was permeated with neoliberal ideology. Drafters were sceptical as to consumer protection, wished to avoid doing any harm to businesses and resolved to retain consumer protection at the minimum level prescribed by the Directive. Hence, the scope of protection *ratione personae*, determined by the definition of the consumer, was reduced to cover natural persons and excluded e.g. NGOs or family businesses acting outside their principal scope of economic activity. The general definition of an unfair term, determining the scope of protection *ratione materiae* was drafted using different language than the directive which suggests the intent of lowering the level of protection. Specifically, good faith and significant imbalance – concepts relating to mutual respect and contractual equilibrium – were substituted by good customs and gross violation of interests, concept which suggests a more lenient approach to rogue traders.

The provisions regarding the abstract review of unfair terms were drafted in a way allowing many interpretations which left the inexperienced judges perplexed. Ambiguities arose, in particular, with regard to the test to be applied in abstract review and the third-party effects stemming from a judgment

condemning a particular unfair term. Various constructions of the statutory rules were put forward, ranging from sweeping pro-consumer interpretations endorsing truly abstract review and unfettered third-party effects, down to restrictive ones, aimed at limiting the impact of the new regulations. The Supreme Court, not bound by any formalised doctrine of precedent, erratically ruled in favour of one or the other theory, leaving consumers and the legal community disorientated.

In a jurisdiction at the outset of its path to effective consumer protection, a black list of unfair terms would have been a useful guidance for the courts. However, the legislature did not acknowledge such a need and only a grey list was enacted. What is more, despite the rather open-ended formulation of the legal provision introducing the list, the Supreme Court ruled that it does not even create a presumption of unfairness.

The Register of Unfair Terms, where all terms condemned in abstract review are entered, could play a more significant role were its legal effects clearly set out by the legislature. However, with the varying interpretations as to its third-party effects in the Supreme Court case-law, traders remain uncertain as to whether all terms contained therein are prohibited or perhaps the Register's role is limited to a mere chronicle of the Consumer Court's activity.

Some optimism is permitted when analysing the new legal transplant from Sweden – the group action. This procedural mechanism allows consumers and tort victims to bring collective actions against a trader or tortfeasor. It has met with enthusiastic welcome of citizens who have brought as much as 40 group actions during the first year. However, to what extent the group action procedure will boost consumer protection depends ultimately on the approach of the judiciary and its willingness to employ an activist approach in deciding such cases.

Summarising, it can be said that the institutional implications of the Unfair Terms Directive, although significant against Poland's earlier record of consumer protection, could still be enhanced. This could be done by legislative intervention, especially with regard to the definition of the consumer, the test of unfairness, the scope of third-party effects of judgments in abstract review proceedings and the intensification of the legal effects of the list of unfair terms (introduction of a black list, attachment of a presumption of unfairness to the grey list). However, what is also needed is the change of mentality of the judiciary and the legal community at large with regard to consumer protection.

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