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Implementation of the Unfair Commercial Practices Directive in Polish Law

1. Introduction

The Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market¹⁾ (Directive 2005/29/EC) aims at harmonizing member states' legislation concerning unfair commercial practices in business-to-consumer (B2C) relations. Directive 2005/29/EC, in an attempt to establish a high level of consumer protection, clearly states that the harmonization in the area which it regulates is a complete one. Thus consequently there is relatively little room for the member states to decide upon their own mode of implementation. This differs significantly from the minimal harmonization approach adopted in other directives in the area of consumer protection and unfair competition law.

The reasons for turning towards complete harmonization were explained in the recitals to Directive 2005/29/EC. Minimal harmonization approach, adopted for instance in Directive 84/450/EC on misleading advertising²⁾ – the first community act which intended to harmonize certain aspects of unfair competition law – resulted in member states adopting different standards³⁾. This led, it was argued, to great uncertainty as to the level of protection one could expect to encounter in other member states. Thus, when drafting Directive 2005/29/EC there was consent that only complete harmonization could guarantee certainty and protection the consumers required. It should be stressed however that Directive 2005/29/EC does not provide for complete harmonization of all aspects of unfair competition law of the EC member states. It attempts to harmonize relations at B2C level only.

The adopted mode of harmonization has determined the ways in which Directive 2005/29/EC should be implemented in national laws of the member states⁴⁾. Member States are not only prohibited from raising the level of protection above the level of protection envisaged in Directive 2005/29/EC, in fact they must virtually copy much of the very detailed and casuistic regulations found in the text of Directive 2005/29/EC to their national laws. This might be particularly problematic for those member states who already have an established tradition of unfair competition laws and where those applying unfair competition laws are accustomed to particular terminology.

Directive 2005/29/EC was implemented in Polish law by the Unfair Commercial Practices Act (UCPA)⁵⁾ adopted on 23 August 2007. The Polish legislator chose to regulate unfair commercial practices in B2C relations in a separate act, outside of the Act on Combating Unfair Competition (ACUC)⁶⁾ which until UCPA's adoption had been the cornerstone of Polish unfair competition law.

The purpose of this article is to present Polish implementation of Directive 2005/29/EC. Emphasis shall be pla-

ced on matters where national legislators were left with at least some degree of freedom of regulation and where Polish implementation brings original solutions as is the case with remedies. The areas where national legislator's role was limited to merely copying provisions of the Directive to national laws will only be discussed very briefly or will not be covered at all.

2. The structure of the UCPA

The UCPA is comprised of: (1) provisions that were copied from Directive 2005/29/EC and its appendices without any changes or with slight changes only; (2) provisions which were drafted by the national legislator and which relate mainly to civil and criminal liability as well as burden of proof that is areas where Directive 2005/29/EC left much more freedom to member states, and (3) provisions that introduce changes to the other acts, in particular ACUC.

As far as the first group of provisions is concerned one may realize that for instance art. 7 UCPA (with respect to misleading practices) and in art. 9 UCPA (with respect to aggressive practices) are copies of the provisions of Annex I to the Directive 2005/29/EC containing the list of both misleading and aggressive practices which are to be regarded as unfair in all circumstances. Similar approach was taken with respect to provisions of Chapter I Section 1 (Art. 6-7 Directive 2005/29/EC) which deal with misleading commercial practices as well as provisions of Chapter I Section 2

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- 1) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149 from 11 June 2005, pp. 22-39.
- 2) Directive 84/450/EEC of the Council of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250 from 19 September 1984, pp. 17-20; Consolidated text: Directive 2006/114/EC of the European Parliament and the Council concerning misleading and comparative advertising, OJ L 376 from 27 December 2006, pp. 21-25.
- 3) Recital 5 to Directive 2005/29/EC.
- 4) A. Kunkiel-Krynska, Implementacja dyrektyw opartych na zasadzie harmonizacji pełnej na przykładzie dyrektywy o nieuczciwych praktykach handlowych, Monitor Prawniczy 18/2007, p. 989.
- 5) Ustawa z dnia 23 sierpnia 2007 roku o przeciwdziałaniu nieuczciwym praktykom rynkowym, Dz.U. 2007, No. 171, Item 1206.
- 6) Ustawa z dnia 16 lutego 1993 r. o zwalczaniu nieuczciwej konkurencji, Dziennik Ustaw 2003, No. 153, Item 1503.

(Art. 8-9 Directive 2005/29/EC) which deal with aggressive commercial practices.

The provisions of UCPA that deal with both civil (Section 3, art. 12-14 UCPA) and criminal liability (Section 4, art. 15-17 UCPA) regulate matters left by Directive 2005/29/EC to national legislators. These are matters where the provisions of Directive 2005/29/EC only set general goals that should be obtained while leaving the means of achieving them to member states. The Polish legislator also decided not to copy the exact wording of the art. 5 (2) which introduces a general clause defining the concept of an unfair commercial practice. The Polish legislator drafted the general clause (art. 4 UCPA) in a manner that takes into account national traditions of unfair competition law. The UCPA, unlike the Directive 2005/29/EC, contains definition of an average consumer.

The third group consists of provisions of articles 18-20 UCPA which introduce changes to other acts, in particular to ACUC. From the perspective of Polish unfair competition law the most important provision is art. 18 UCPA, which modifies articles 1 and art. 19 ACUC. Art. 19 UCPA brings amendments to the Act on protection of competition and consumers⁷⁾.

3. UCPA in Polish unfair competition law

Before UCPA was adopted Polish unfair competition law was regulated by ACUC. The passing of UCPA introduced an important change to ACUC. Art. 1 of ACUC prior to adopting UCPA, provided that the act regulated combating and prevention of unfair competition in the public interest as well as the interests of entrepreneurs, clients and consumers. ACUC was based on the idea of protecting various interests within a single act⁸⁾. It has been argued that such an approach to unfair competition law guaranteed protection of effective competition for the benefit of all participants on the market⁹⁾.

At present there are two acts in the field of unfair competition law. The ACUC, in line with its art. 1, aims at protecting and combating unfair competition in the public interest as well the interests of entrepreneurs and their clients, whereas the UCPA, according to its art. 1, operates in the public interest and the interests of consumers. The idea of regulating unfair competition practices in B2C and B2B relations separately has been strongly criticized in Polish jurisprudence.

Firstly separation of protection of various interests is artificial, these interests in fact may hardly be separated in many cases. A commercial practice that directly affects the interests of the consumers in majority of cases will also at least indirectly affect the interests of competitors. Therefore though the UCPA directly protects consumers' interests, in fact it also indirectly protects the interests of entrepreneurs¹⁰⁾.

Secondly such a clear division of protection of interests in two separate acts is not required by the Directive 2005/29/EC. It seems that reasons for preparing an act that was directed at protecting consumers exclusively were primarily pragmatic. It was certainly easier and consequent-

ly faster to prepare a new act, rather than modify the existing ACUC.

Thirdly it was suggested that unity of Polish unfair competition law should be kept and that unfair trade practices should be rather treated as a special type of unfair competition torts. M. Kepinski suggested that the directive should be implemented within one act regulating the field of unfair competition law comprehensively¹¹⁾.

Fourthly both UCPA and ACUC have common aim that is to ensure fairness of economic activities¹²⁾. It seems however that for mainly pragmatic reasons the idea of having two separate acts turned out to be a more attractive one from the legislator's perspective.

It is also argued that even with the introduction of UCPA and amendments to ACUC and in particular the deletion of the reference to consumer interests in art. 1 ACUC, interests of consumers may still be protected through the ACUC because art. 1 ACUC mentions the interests of clients, and the clients need not necessarily be entrepreneurs, the term also encompasses consumers¹³⁾. Although theoretically the assumption is correct it has little practical consequences. Thus even if we assume that ACUC still aims at protecting interests of consumers, as a special category of clients, the provisions of ACUC do not grant anyone standing to act in the interests of consumers. Articles 18 and 19 ACUC grant standing to entrepreneurs as well as organizations whose statutory aim is protection of entrepreneurs' interests. Consumers have never had standing under ACUC and the President of the Polish competition authority, who could act to protect consumers, was deprived of the right to litigate under the ACUC.

4. Definition of an "average consumer"

The UCPA, in art. 2(8), for the first time in Polish law defines the concept of an "average consumer". Of course the courts have already referred to that concept in unfair competition and trademark cases, however this is the first time that the definition appears in a statute. The concept is crucial from the point of view of protecting consumer interests against unfair commercial practices because commercial practices are assessed from the perspective of an average consumer and such practices become unfair only if they materially distort or are capable of materially distorting the economic behavior with respect to the product of such an average consumer.

7) Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz. U. 2007, No. 50, Item 331.

8) J. Szwaja, A. Tischner, Implementacja dyrektywy 2005/29/WE o zwalczaniu nieuczciwych praktyk handlowych do prawa polskiego, Monitor Prawniczy 20/2007, p. 1119.

9) *Ibidem*, p. 1121.

10) M. Sieradzka, Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym, Warszawa 2008, p. 20.

11) M. Kepinski, Kilka uwag o projekcie ustawy o zwalczaniu nieuczciwych praktyk handlowych, w: Współczesne problemy prawa handlowego. Księga jubileuszowa dedykowana prof. dr hab. Marii Pozniak-Niedzielskiej, A. Kidyba, R. Skubisz (red.), p. 134.

12) M. Sieradzka, Ustawa o przeciwdziałaniu, p. 23.

13) E. Nowinska, M. du Vall, Komentarz do ustawy o zwalczaniu nieuczciwej konkurencji, Warszawa 2007, p. 37.

The wording of the definition clearly refers to the jurisprudence of the European Court of Justice¹⁴) as well as recital 18 to Directive 2005/29/EC. Art. 2(8) UCPA provides that an average consumer is a consumer who is sufficiently well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors as well as the fact that a given consumer may belong to a clearly identifiable group of consumers who are particularly vulnerable to unfair commercial practices because of characteristics such as age or the fact of being mentally or physically handicapped.

Decision of the legislator to bring to the text of UCPA the definition of an average consumer is welcome. This is so particularly because the concept of an average consumer has not always been properly understood by Polish courts or administrative organs. This sometimes has ended up with the courts wrongly dismissing claims of unfair competition. An interesting illustration of the misapplications of the average consumer test is the decision of Appeals Court in Warsaw relating to an airline operator's advertising campaign¹⁵). An airline operator advertised cheap flights from Warsaw to Vienna, without mentioning that the planes in fact landed in Bratislava, a Slovak capital located some 60 km from Vienna. An airline operator claimed that the information as to the place of landing could easily be obtained by analyzing carefully a detailed flight schedule available on its website. The Warsaw Appeals Court did not find the advertising campaign misleading and justified its decision by referring to an average airline customer who books flights over the internet. Such customers are observant and circumspect and consequently are also capable of verifying the advertisement's content – in this case by checking the exact flight schedule.

Another good example of misapplication of the concept of an average consumer are cases relating to advertisements in pharmaceuticals market. The District¹⁶) and Appeals¹⁷) courts in Lodz were asked to decide on pharmaceuticals advertising leaflets. Each leaflet had a number of products with two prices under each product. With respect to every product one of the prices was crossed. This clearly suggested a significant price reduction and a good bargain for the customer. However there was also a small asterix near the prices which accompanied each of the products and an explanation at the bottom of the leaflet specifying that the price that is crossed out is an average price suggested by the leading wholesalers in the region. Both courts justified their dismissal of unfair competition claims of misleading advertising by referring to the concept of a well-informed and reasonably observant and circumspect consumer. The court rejected the arguments that an average consumer of pharmaceuticals is usually ready to do anything to improve his health and that very often it is an elderly person who has difficulty reading information in small print at the bottom of the advertising leaflet. Besides both courts completely disregarded the fact that what matters in advertising is the first impression of the addressee, that impression in this case was one of a significant price cut.

Hopefully the introduction of the definition of an average consumer in the UCPA would help courts avoid such unsound decisions as the decisions in the two cases discus-

sed above. The standard of an average consumer should not be set too high. The definition makes it clear that in assessing whether a given commercial practice may distort economic behaviour of a consumer regard must be paid to all circumstances of a given case. That assessment might produce different results depending on a member state, as the social, cultural and linguistic factors that should be taken into account might differ from member state to member state¹⁸). The UCPA definition of an average consumer not only follows the relevant recitals to Directive 2005/29/EC but is also perfectly in line with the caselaw of the ECJ. For instance in *R. Buet and EBS SARL v. Ministère public*¹⁹) the ECJ admitted that there are groups of consumers who are particularly susceptible to unfair practices. Additionally in *Estee Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*²⁰) the ECJ stated that a trademark that does not mislead consumers in one of the member states might do so in another member state due to linguistic, cultural and social differences.

It remains to be seen how far the Polish courts and competition authorities might go in taking into account local circumstances when applying the standard of an average consumer. In a relatively recent judgment one of the Polish courts stated that consumers in a country like Poland, unlike the consumers in other countries, had not been subjected to various marketing techniques and therefore are less experienced and more susceptible to various marketing tools. Thus the assessment of commercial practices that are directed towards consumers should be more restrictive²¹). Certainly such reasoning goes very much in the direction once so heavily criticized by the ECJ in the famous *Mars* judgment²²). This type of paternalistic approach towards consumers is unlikely to be accepted particularly because it might be seen, as the ECJ already clearly stated in the *Mars* decision, as an obstacle to one of the fundamental freedoms, namely free movement of goods.

5. Introduction of a new general clause

Directive 2005/29/EC introduced a new general clause in article 5. The provision contains a general prohibition of unfair commercial practices. According to art. 5 two conditions must be met in order to label a given practice as an unfair commercial practice. Firstly the practice must be contrary to requirements of professional diligence. Second-

14) C-290/90 Commission vs. Germany, ECR I-3874.

15) Warsaw Appeals Court VI/Aca 842/07 quoted after A. Michalak, *Przeciwdziałanie nieuczciwym*, p. 64-65.

16) Judgement of the Lodz District Court, X GC 13/05.

17) Judgement of the Lodz Appeals Court, I/Aca 885/06.

18) M. Namysłowska, *Nowa ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*, *Monitor Prawniczy* 23/2007, p. 1289.

19) Case C-382/87 *R. Buet and EBS SARL v. Ministère public*, ECR 1989, I-1235.

20) Case C-220/98 *Estee Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*, ECR 2000, I-1117.

21) Judgment of the SOKiK in the case of appeal by TP SA against the decision of the President of the Polish competition authority, XVII Ama 118/04, *Dz. Urz. UOKiK* 2006, no. 2 item 31, p. 89.

22) Case 470/93 *Verein Gegen Unwesen in Handel und Gewerbe Koln eV v. Mars GmbH*, ECR 1995 I-1923.

ly the practice must materially distort or be likely to materially distort the economic behavior of consumers.

Reasons for introducing a general clause like the one in art. 5 Directive 2005/29/EC were clearly stated in the Directive's preamble. Recital 13 stresses the necessity of replacing Member States' existing, divergent general clauses with a common general prohibition. Introduction of a common general clause is thus seen as a means of achieving a truly common market with no internal barriers. Adoption of identically worded clauses by Member States was regarded as vital to achieving that goal.

The general clause as adopted in article 4 of UCPA is worded slightly differently. According to article 4(1) UCPA the practice is unfair if it is contrary to good customs and if it distorts or is likely to distort economic behavior of an average consumer before concluding a contract relating to the product, at the time when the contract is concluded and after the contract is concluded. The concept of professional diligence, to which art. 5(2)(a) Directive 2005/29/EC refers, was replaced with the concept of good customs (*dobrze obyczaje*). Clearly the slightly different wording of the general clause in art. 4 UCPA is related to the traditions of Polish unfair competition law. The general clause in the Act on Combating Unfair Competition (art. 3 ACUC) refers to the concept of good customs as well. Replacing professional diligence with the concept of good customs is generally accepted in Polish jurisprudence²³.

It seems however that the two concepts are very similar. The definition of the concept of professional diligence, which itself is a new concept in most if not all of the EC member states, can be found in art 2(h) Directive 2005/29/EC. The definition in art. 2(h) makes direct reference to standards of behavior commensurate with honest market practice and general principle of good faith in the trader's field of activity²⁴). The concept of good customs as used in Polish unfair competition law refers to a set of moral and customary norms prevailing in business generally or in particular field of economic activity²⁵). To illustrate this reference can be made to one of the judgments the competition court where the court explained that "the idea of respect for another human being lies at the very centre of the concept of good customs"²⁶). It went on and explained that in relations with consumers the above mentioned respect required that consumers were properly informed about their rights and that the entrepreneur did not take advantage of its privileged position towards consumers.

One has to admit however that it is against the intentions of the community legislator for the member states to draft their general clause in line with their national traditions. The community legislator intended to replace the various national clauses with one clause common to all member States in order to avoid different application of the general clause. On the other hand the exact meaning and scope of the concept of professional diligence needs to be clarified in practice and therefore careful attention must be paid to developments in the jurisprudence of other member States as well as the European Court of Justice. This will of course influence the application of the concept of good customs in art. 4 UCPA as national legislation must be ap-

plied in conformity with community legislation, including directives.

6. Means of combating unfair commercial practices

Directive 2005/29/EC requires that Member States ensure adequate and effective means to combat unfair commercial practices²⁷). It does not specify however their character. Member states are free to choose from civil, administrative and criminal remedies. The Polish Unfair Commercial Practices Act introduced both civil and criminal remedies.

The Directive does not oblige member states to grant remedies to individual consumers. Art. 11 of the Directive 2005/29/EC merely provides that remedies should be granted either to persons or national organizations regarded under national law as having interest in combating unfair commercial practices. Granting remedies directly to consumers is a novelty in Polish unfair competition law. The Act on Combating Unfair Competition has never granted remedies to individual consumers though it stated until the introduction of the UCPA that protection of the consumer interests was among its goals. In many cases consumers, who will make use of the remedies granted to them by the provisions of the UCPA, will not only protect their own interests but will also act for the benefit of other consumers – the remedies in the UCPA can therefore be regarded as *actio popularis*²⁸).

Numerous doubts have been raised in the jurisprudence with respect to granting of individual remedies to consumers. Arguments raised are of both practical and theoretical nature. The practical concerns relate to the fact that individual cases will generally be minor ones. On the one hand it might therefore result in a large number of relatively minor cases filed with the courts²⁹). On the other hand the relatively minor relevance of the disputes might deter individuals from going to the court in the first place³⁰). The theoretical arguments point to the fact that practices of the entrepreneurs are judged from the perspective of an average consumer. Therefore even if a practice is misleading from the perspective of an individual consumer and thus considered by him as jeopardizing or even infringing his interests, it might not necessarily be regarded as an unfair practice under UCPA. It might pass the test of an average consumer³¹).

Civil remedies are regulated in section 3 of the UCPA. The catalogue of remedies is similar to the catalogue of remedies in article 18 ACUC. It is therefore justified to refer to the jurisprudence developed with respect to art. 18

23) M. Sieradzka, Ustawa o przeciwdziałaniu, p. 76.

24) Art. 2 (h) Directive 2005/29/EC.

25) M. Kepinski, Problemy ogólne nowej ustawy o zwalczaniu nieuczciwej konkurencji, PiP 2/1994, p. 1.

26) Judgment SOKiK, XVII Ama 118/04, Dz. Urz. UOKiK 2006, No. 2, Item 31.

27) Art. 11 Directive 2005/29/EC.

28) A. Michalak, Przeciwdziałanie nieuczciwym, p. 122.

29) J. Szwejca, A. Tischner, Implementacja dyrektywy, p. 1121.

30) *Ibidem*.

31) *Ibidem*.

ACUC³²). Article 12 of the Act states that a consumer whose interests have been endangered or infringed may demand: (1) cessation of unfair commercial practices (art. 12(1)(2) UCPA), (2) removal of consequences of unfair commercial practices (art. 12(1)(2) UCPA), (3) publication of one or several statements of certain content and form (art. 12(1)(3) UCPA), (4) damages as well as a declaration the contract is invalid (art. 12(1)(4) UCPA), (5) adjudicating of a certain amount for a specified social purpose connected with the support of Polish culture or protection of national heritage (art. 12(1)(5) UCPA).

The remedies listed in art. 12 of the Act are available to a consumer whose interests have been endangered or infringed. The notion of consumer interests has not been clarified. In the jurisprudence the interests of consumers are described either as economic interests or as legal interests. There is a dispute as to whether the notion of interests in art. 12 refers to economic interests³³) or legal interests³⁴). Indeed if the notion of consumer interests is equated with the concept of economic interests of consumers the result would be the availability of remedies in greater amount of cases since there is no need of showing that a given economic interest is protected by the legal system. The concept of legal interest is narrower. Legal interests are defined as certain needs of the consumer that are treated by the legal system as worth protecting³⁵). Practically however the controversy should not have far reaching consequences. The first three remedies are available without the need of proof of actual damage. Neither is the proof of intention or negligence required. The fourth and the fifth remedy require proof of fault and additionally the fourth requires proof of actual damage suffered by the party.

The remedies are not only available to individual consumers. According to art 12(2) UCPA the remedies listed above as first, third and fifth are also available to: (1) Ombudsman (*Rzecznik Praw Obywatelskich*) (art. 12(2)(1) UCPA); (2) Insurance Ombudsman (*Rzecznik Ubezpieczonych*) (art. 12(2)(2) UCPA); (3) national and regional organizations whose statutory aim is the protection of con-

sumer interests (art. 12(2)(3) UCPA); and (4) local advocates of consumer interests (*powiatowy lub miejski rzecznik konsumentów*) (art. 12(2)(4) UCPA).

Interim relief (interim measures, interim injunctions) is also available to consumers. Although the UCPA does not envisage such relief its availability is based on the provisions of the Code of Civil Procedure (art. 730 et seq.). The consumer may ask the court for an interim order of cessation of an unfair commercial practice for the period of time preceding the decision on the merits .

Directive 2005/29/EC requires that member states grant a right to demand cessation of unfair commercial practice and in case the unfair commercial practice is imminent a right to demand an order prohibiting such practice. The UCPA envisages a remedy that allows to take action in civil courts only after an unfair commercial practice has been carried out. Art. 12(1) UCPA clearly states that remedies are available "... *In case an unfair consumer practice is committed ...*". That does not mean however that a consumer may not react if the practice has not been carried out yet but is imminent and if such imminent practice may put consumers interests in peril. Such a remedy is available on the basis of art. 439 of the Civil Code³⁶). This however requires a party seeking relief envisaged in art. 439 of the Civil Code to prove that there is a direct danger of suffering damage. Proof of damage may not always be possible. Consumers are also free to take advantage of other remedies available in civil law, in particular the Civil Code as well as other legislation aimed at protecting consumers. In particular a consumer may release oneself from a contract entered into on the basis of mistake (art. 84 Civil Code) or fraud (art. 86 Civil Code)³⁷).

32) M. Sieradzka, Ustawa o przeciwdziałaniu, p. 240.

33) A. Michalak, Przeciwdziałanie nieuczciwym, p. 122-123.

34) M. Sieradzka, Ustawa o przeciwdziałaniu, p. 239.

35) *Ibidem*.

36) *Ibidem*, p. 240.

37) J. Szwaia, A. Tischner, Implementacja dyrektywy, p. 1121.

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