

Consumer! (From the Volume Editor)

Articles

F. Zoll, **Problem with the concept of “sales” in the new Polish Consumer Rights Act – the question of mixed contracts with a service component**

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- I. Introductory remarks – the problem with the implementation of the notion of “sales” from the Consumer Rights Directive
- II. Definition of Article 2 No. 5 of the Consumer Rights Directive in relations to Article 6 of the Polish Consumer Rights Act
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Summary: The paper deals with questions surrounding the transposition of the Consumer Rights Directive into the Polish legal system. The paper focuses on Article 2. No 5. of the Directive and its implementation. The Polish legislator has passed a separated Consumer Rights Act and yet some of the relevant provisions are placed in the Polish Civil Code. Problems arise in the mutual interaction of relevant rules spread in two different legal acts. The national rule implementing Article 2 No. 5 of the Directive has been placed in the Consumer Rights Act. It defines sales contracts but also covers mixed contracts with a service component. Although its implementation has been placed outside the Civil Code, the above provision plays the role of a general rule in relation to the provisions implementing the Directive that have been inserted into the Civil Code. This complex multi-layer structure causes several problems with the actual scope of the application of Article 6 of the Consumer Rights Act. The paper deals also with the methodology of the technique used to implement European law in the codified system.

Keywords: Directive 2011/83/EU, Consumer Rights Act, contract of sales, mixed contract

Anna Oponowicz, **Abusive provisions of model agreements concluded with consumers – changing trends in Polish jurisprudence**

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Summary: This article presents selected issues raised in Polish jurisprudence on matters concerning the recognition of provisions contained in model agreements as abusive clauses. Due to the

unprecedented increase in the number of such cases in recent years, as well as a fundamental change in the circumstances in which they are filed to the courts, these problems affect an increasing number of businesses that use model agreements for their consumer transactions. The paper outlines the differences of opinions presented in Polish jurisprudence and the directions in which these views are evolving.

Keywords: abusive contract terms, Register of Prohibited Clauses, model agreements, extended legal validity of judgments, consumer, legitimacy, principles of social coexistence, costs of proceedings

Joanna A. Luzak, **On consumer's remedies for non-conforming goods after the judgment of the Court of Justice of the European Union in *Weber and Putz***

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- III. Judgment of the CJEU in joined cases *Weber and Putz*
- IV. German viewpoint
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- VII. Conclusions

Summary: The role of the CJEU is to interpret EU law provisions so as to promote the intentions of the European legislator. Clarity introduced by the CJEU is supposed to contribute to further harmonization of national legal systems of its Member States. However, when a judgment raises as many questions as it answers, like in the *Weber and Putz* case on the assignment of liability for costs that must be covered when a non-conforming good is replaced, national courts might find it hard to fulfil their duty of consistent interpretation. This article examines the implementation of the *Weber and Putz* judgment by German courts, where this case had originated. It identifies difficulties in the use of the test provided by the CJEU whereby the national judge can decide how to divide among consumers and sellers the costs of the removal of already installed, non-conforming goods and of the installation of new, conforming goods. The analysis presents also potential unexpected effects of the CJEU ruling. Due to the lack of full harmonization of European consumer sales law, and the fact that damages were left to national laws to regulate, consumers may be significantly better off in some Member States if they chose the opt-out clause created in *Weber and Putz*: to terminate the contract and claim damages, instead of trying to give sellers another chance to perform.

Keywords: Consumer sales, non-conformity, replacement of goods, division of costs, termination of sales contract, damages

Anna Piszcz, **Commission Recommendation regarding collective redress. How to implement it in Poland?**

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Summary: This article presents Commission Recommendation of 11 June 2013 on collective redress mechanisms which was published in the EU Official Journal on 26 July 2013. The article indicates potential difficulties in the case of its implementation into the domestic legal system by the Polish legislature. In particular, it deals with issues of the adjustment of Polish legal provisions to the rules of the Recommendation with respect to basic definitions, legal standing to bring actions and their admissibility, as well as funding.

Keywords: collective redress mechanisms, claim for injunction, claim for damages, violation of rights granted under Union Law, group proceedings, class actions

Małgorzata Sieradzka, **Impediments to the effective enforcement of consumer claims in class actions for infringements of prohibited practices violating collective consumer interests.**

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 - 2.1. Claims for payment
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 - 3. Opt-in conditions
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Summary: Consumers participate in business transactions. A review and analysis of consumer legislation shows that they enjoy a number of rights in their relationships with professionals (entrepreneurs). The legislator (national and EU) consistently seeks to enhance the protection of consumer's rights, which in turn leads to a gradual expansion of the duties placed on entrepreneurs towards consumers. An example of the above can be found in the Polish Consumer Rights Act of 30 May 2014. Nevertheless, considering the economic interest of consumers, it is essential to ensure effective instruments for the enforcement of the guaranteed rights. Lengthy proceedings, evidence collection difficulties, small value claims, high litigation fees are just some of the barriers that prevent consumers from seeking redress. The above obstacles contribute to consumers' low level of interest in pursuing claims individually in civil proceedings. Class actions were intended by the legislator to become an alternative to solo civil claims. The paper's aim is to identify the barriers that may restrict group litigation and affect the effectiveness of claim enforcement by consumers.

However, irrespective of their existence, if only the circumstances of the case speak for collective redress, a class action will be a more effective way to protect the interests of numerous consumers than an individual civil lawsuit, regardless of its duration.

Keywords: consumers, claims, collective consumer interest, pursuing claims for an infringement of prohibited practices violating collective consumer interests, damage

Jagna Mucha, **Alternative dispute resolution for consumer disputes in European law – the latest legal solutions (Directive 2013/11/EU on consumer ADR and Regulation 524/2013 on consumer ODR)**

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- IV. Controversies over Directive 2013/11/EU on consumer ADR and Regulation 524/2013 on consumer ODR
- V. Conclusions

Summary: Ensuring access to simple, efficient, fast and low-cost dispute resolution methods has proven to be one of the most important tasks of European institutions in recent years. Due to the fact that alternative dispute resolution (ADR) methods fulfil all of the above mentioned criteria, the European Commission adopted some measures aiming at the application of these methods to deal with consumer disputes. The Commission specified these initiatives in 2011 in its proposal of Directive 2013/11/UE on consumer ADR and Regulation 524/2013 on consumer ODR. Closer scrutiny of the respective provisions of these EU acts makes it possible however to identify a number of problems surrounding their application in national legal orders. The paper indicates some controversial issues emerging from the implementation and application of these provisions including: potentially hindering consumer access to justice; increased risk of entrepreneurs abusing their position; quality of decisions rendered by ADR entities as well as their dubious impartiality and independence; the need for incurring the costs of developing a coherent ADR system in the whole EU.

Keywords: alternative dispute resolution, consumer protection, redress procedure, online dispute resolution, consumer law enforcement, Directive 2013/11/EU on consumer ADR, Regulation 524/2013 on consumer ODR, ADR entity, access to justice

Izabela Wesołowska, **Conditions for the recognition of a practice as an infringement of collective consumer interests**

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- VII. Summary

Summary: This article highlights problems related to the interpretation of practices infringing collective consumer interests. In particular, it presents the reasons for the ban on practices infringing collective consumer interests. Furthermore, the paper attempts to specify and clarify the definition of collective consumer interests.

Keywords: ban of practices infringing collective consumer interests, conditions for the recognition of a practice as an infringement of collective consumer interests, any unlawful activities of an entrepreneur, public interest, consumer interests, the definition of collective consumer interests

Legislation and case law reviews

Impact on the e-commerce industry of changes in consumer's right to withdraw from a contract implemented by the Consumer Rights Act (Maciej Godyń)

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- III. Changes in consumer's right to withdraw implemented by the Consumer Rights Act
 - 1. The time limit for withdrawal
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- IV. The consequences of the relevant legal changes for the e-commerce industry
- V. Summation

Summary: The article depicts changes, which will be implemented in the Polish legal order by the Consumer Rights Act promulgated on 30 May 2014 in term of consumer's right of withdrawal concerning distance contracts. Particular focus will be placed on four main issues: the time limit for the withdrawal, the form of the statement of withdrawal, the cost of returning a product and exclusion of the right of withdrawal. The article compares existing rules with provisions that will be implemented by the Consumer Rights Act.

Keywords: consumer protection, withdrawal, distance contracts

The right of withdrawal from contracts under the Consumer Rights Act: the example of admission tickets (Teresa Kaczyńska)

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- III. Characteristics of tickets as a specific category in business-to-consumer transactions
- IV. Lack of an explicit indication that tickets are a category covered by the exceptions to the right of withdrawal in the amended legislation
- V. Conclusions

Summary: This article aims to present legislative changes in the field of consumer's right of withdrawal concerning distance and off-premises contracts. While discussing the new rules, attention is drawn to interpretation problems regarding the lack of an explicit indication whether admission tickets are a category covered by the exceptions provided in the new Consumer Rights Act.

Keywords: The Consumer Rights Act, the right of withdrawal from a contract, tickets

Draft of the reform of the abstract control of unfair contract terms (Michał Strzelecki)

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Summary: The article discusses the "Draft Assumption of the Act amending the Act - Code of Civil Procedure and other acts" presented on 23 May 2014 by the Polish Ministry of Justice which aims to regulate issues concerning the abstract control of contract terms. Analysed will also be comments made in the process of public and inter-ministerial consultations surrounding this measure. The most important proposal for legislative changes relates to the binding force of a judgment given in proceedings concerning unfair contractual terms and the right to file a claim in such proceedings.

Keywords: Unfair contract terms, abusive clauses, abstractive control, the register of the unfair contract terms

Analysis of 2013 EUCJ jurisprudence concerning Directive 2005/29/EC on Unfair Commercial Practices (Dominika Ewa Harasimiuk)

Summary: The article aims to analyse recent jurisprudence of the CJEU on the provisions of Directive 2005/29/EC on unfair commercial practices. The scope of cases brought before the CJEU relates to different practical aspects of the application of Directive 2005/29/EC by national courts. Mentioned, among the issues interpreted by the CJEU, can be the conditions of unfair misleading practices, including the assessment of the relevant influence of the practice on a consumer (case *Trento Sviluppo*), and the significance of requirements of professional diligence (case *CHS Tour Services*). The analyzed judgments relate also to problems of a more general nature such as the character of the harmonization method adopted by the Directive (case *Citroën Belux*), its personal scope, and the notion of a “trader” (case *BKK Mobil Oil*). The CJEU ruled also on the possibility of ex ante administrative controls of unfair practices (case *Köck*); general prohibition of a practice not covered by the black list (case *Euronics Belgium*); and the application of Directive 2005/29/EC to press publishers who infringe national rules on proper identification of advertisers (case *RLvS*).

Keywords: unfair commercial practices, black list, misleading character, harmonization, trader, high level of consumer protection

Table of judgments of the Polish Court of Competition and Consumer Protection in 2013 (Anna Oponowicz)

Books reviews

Natali Helberger, Lucie Guibault, Marco Loos, Chantal Mak, Lodewijk Pessers, Bart van der Sloot, *Digital Consumers and the Law: Towards a Cohesive European Framework*, Wolters Kluwer Law & Business 2013, ss. 284 (Katarzyna Klafkowska-Waśniowska)

Maria Królikowska-Olczak, Beata Pachuca-Smulska (red.), *Ochrona konsumenta w prawie polskim i Unii Europejskiej*, C.H.Beck, Warszawa 2013, ss. 394 (Anna Piszcz)

Events and activity reports

Report on the *Second Annual Conference on the Unfair Commercial Practices Directive*, Budapest, Pázmány Péter Catholic University, 13 March 2014 (J.A. Luzak)

Report on the Conference entitled *Consumer law in the light of forthcoming changes*, Office of Competition and Consumers Protection, Warsaw, 18 March 2014 (Monika Namysłowska)

Report on the Conference entitled *The Image(s) of the ‘Consumer’ in EU Law: Legislation, Free Movement and Competition Law*, St Anne’s College, Oxford, 27–28 March 2014 (Monika Namysłowska)