

Waiting for changes (from the Volume Editor)

ARTICLES

Marta Dzieciuch, **Assessment of the Polish legislative process on the example of recent changes in financial markets law**

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Summary: This article deals with Polish legislative procedure from the perspective of financial market institutions, recently affected by frequent changes of the applicable legal framework, directly influencing the way in which they conduct their business activity and the relations between a client and a financial market entity. The analysis covers Polish legislative initiatives related to the financial market and, at the same time, impacting the situation of its clients over the years 2015–2017, since the day we have observed the so called ‘tsunami of legislation’ on the financial market. The assessment of the Polish legislative procedure within the financial market includes not only critical comments on the current legislative model, but also proposals *de lege ferenda* aimed at removing the identified weaknesses of this process.

Key words: legislation; legislative process; Rules of Legislative Technique; financial markets; banking; bills concerning Swiss francs; lawmaking.

JEL: K23

Bartosz Wyżykowski, **The principles of debt restructuring based on the provisions of the law on mortgage loans and on the supervision of mortgage brokers and agents**

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Summary: The purpose of this article is to discuss the provisions of the new Law on Mortgage Loans and on the Supervision of Mortgage Brokers and Agents, regulating the principles of debt restructuring. Under strictly defined circumstances, the creditor is obliged to inform a consumer about the possibility of submitting a request for the restructuring of his debt. If such a request is submitted, and if the financial situation of the given consumer justifies it, the parties should make efforts in order to restructure the debt of the consumer; otherwise, the creditor is obliged to explain in detail the reasons for rejecting such a request. However, should the restructuring prove to be pointless or ineffective, the creditor is obliged to allow the consumer to sell his property before taking further steps to recover the amount due. The aim of this article is to indicate possible disputable issues and provide proposals for their resolution.

Key words: consumer; creditor; credit agreement for consumers relating to residential immovable property; debt restructuring.

JEL: K12, K15, K23, K41

Edyta Rutkowska-Tomaszewska, Magdalena Paleczna, **The idea of responsible lending on the non-bank consumer credit market in Poland**

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Summary: The problem of responsible lending by creditors and consumers is increasingly far-reaching in the post-crisis reality because of the large scale of the phenomenon of consumer overindebtedness and its negative effects both individually and globally, as it generates excessive credit and even systemic risk. Responsible lending stops, therefore, being a mere postulate, and becomes the subject of regulation, and broadly understood jurisprudence, as well as very important social problems. The idea of responsible lending is implemented by a proper examination of the creditworthiness of the consumer by the lenders, both before granting the loan and during the loan. Consumers must also be informed of the terms of the loan agreement, in particular about the costs borne by the consumer, as well as of the legal and economic consequences of not doing so. The aim of this study is to present the idea of responsible lending on the part of lenders, such as non-bank lending institutions, as well as ways of its implementation and enforcement. The paper covers also its practical application by both lenders as well as competent institutions, the goal of which is to protect consumers not only against excessive indebtedness, but also against the

occurrence of individual and systemic risk and against miss-selling on the non-bank consumer credit market. All this ultimately leads to a significant deterioration of the financial situation not only of consumers but also of lenders and, as a result, negatively affects the proper and stable functioning of this part of the financial services market (non-consumer consumer credit market and thus consumer credit market in general).

Key words: consumer credit; consumer borrower; non-bank loan institution; lender; consumer protection; responsible lending; responsible lending by consumers; Consumer Credit Act; Directive 2008/48/EC; creditworthiness; information obligation; financial education.

JEL: D18, G23, G28, G29

Artur Tim, **Personal bankruptcy in Polish insolvency law and the practice of forum shopping from the perspective of German-Polish economic relations**

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Summary: The Author drafts Polish and German regulations on personal bankruptcy, the issue of trans-boundary insolvency law in the European Union (including the definition of the Centre of Main Interests, that is COMI, and the elements of its definition in case of trans-boundary personal bankruptcy proceedings), having regard to Polish-German relations and the legislation of both jurisdictions. The paper presents also the practice of *forum shopping* and the methods, which were established in EU insolvency law, to counteract this phenomenon. The Author proposes the thesis that not only can certain institutions of Polish personal bankruptcy law be attractive to people with COMI in the territory of Germany, but also that some German regulations can attract people, which have established COMI in Poland. This leads to the conclusion that the practice of *forum shopping* may occur also in German-Polish economic relations, having regard, in particular, to the geographical proximity between both jurisdictions, current practices of German consumers, a lack of precise enough regulations on the harmonization of European trans-boundary insolvency proceedings, and the progressing liberalization of Polish personal bankruptcy law, announced by the Polish government.

Key words: Personal bankruptcy; Polish personal bankruptcy law; German personal bankruptcy law; consumer law; forum shopping; Regulation 2015/848; Regulation 1346/2000.

JEL: K35

Jan Ulański, **Is the insured in an insurance contract on someone else's behalf a 'consumer' in the light of the Polish Civil Code?**

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Summary: In an insurance contract on someone else's behalf, along with the insurer and the policyholder, an insured appears who is not a party to the insurance contract, but it is his insurable interest that is subject to protection. At the same time, the insured (who is often a natural person) is a weaker subject of the insurance contract and should be protected in the same way as a consumer in a typical insurance contract. However, due to the fact that the insured is not a party to the insurance contract, there are doubts whether, in the light of the definition adopted in the Polish Civil Code, he has the status of a 'consumer'. This article attempts to answer this question, mainly in the light of existing jurisprudence.

Key words: consumer; insurance contract; insurance contract on someone's behalf; policyholder; insured.

JEL: K12, K15

Małgorzata Sieradzka, **Public compensation and other measures to remove the continuing effects of an infringement of collective consumer interests**

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Summary: The analysis of decisions issued in cases of practices violating collective consumer interests makes it possible to conclude that the President of the Office of Competition and Consumer Protection (UOKIK) is increasingly 'using' means which are not typical repressive instruments within the meaning of public competition law. Public compensation allows the competition authority to order or oblige

the offending entrepreneur to take specific (marked) actions towards consumers. These may take the form of a material or intangible benefit. Public compensation is intended to remove the continuing effects of an infringement of collective consumer interests. This measure must not only be necessary to remove the effects of the practice, but also proportionate to the gravity and type of the infringement.

Key words: practices that violate collective consumer interests; publication order; making a statement; public compensation; proportionality.

JEL: K21

Katarzyna Południak-Gierz, **Individual protection of consumers in the Act on Counteracting Unfair Market Practices and the ‘New Deal for Consumers’**

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Summary: Although Directive 2005/29/EC does not provide tools for individual consumer protection, the Polish legislator decided to introduce some, as part of the implementation process, in Article 12 of the Act on Counteracting Unfair Market Practices. Currently, as part of the ‘New Deal for Consumers’ initiative, the EU legislator is also considering a revision of the Unfair Market Practices Directive by imposing on national legislators an obligation to provide consumers with instruments of individual civil law protection, including at least the right to unilaterally terminate the contract and the right to claim damages. The study focuses on the main doubts as to the construction of the current Polish regulation of individual protection mechanism and the EU proposal. The aim of the dogmatic analysis is to indicate a *de lege ferenda* solution that would enhance the achievement of the purpose of the directive.

Key words: unfair commercial practices; consumer; individual protection; New Deal for Consumers; directive 2005/29/EC.

JEL: K12, K13

Maciej Czapliński, Aleksandra Kapnik, **Future of the consumer ombudsmen. Remarks for the 20th anniversary of the institution**

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IV. Conclusions

Summary: The approaching 20th anniversary of the creation of a consumer ombudsman is an opportunity to summarize the legal bases and factual conditions for the functioning of ombudsmen in Poland and to ask about the future of this institution. Apart from a few cases, their competences are often unused in practice, primarily because of the lack of independence of the ombudsmen within the administrative structure of a district as well as inadequate funding of their activities. Individual elements of the consumer protection system, such as consumer ombudsmen, non-governmental organizations and ADR entities, do not cooperate with each other, do not exchange information or experiences. Moreover, they duplicate their tasks which leads to wasted potential and the generation of excessive costs. Meanwhile, the challenges of the modern economy and changes that have taken place in Poland over the last two decades require a reform of the system. There is need for new legislative solutions, which will guarantee the independence of consumer ombudsmen and strengthen their role in the local government, as well as organizational activities that will allow better separation of tasks to meet consumer needs and provide them with a high level of protection. The model of protection of individual consumers in Poland should be comprehensive (its elements should cooperate in an atmosphere of mutual trust), complementary (require the consumer to act, not replace it), flexible (adapted to the needs of different consumer groups), professional (ombudsmen should have legal education) and enable customer migration (to a more specialized institution if it is not possible to provide effective help at a given level). Creating a systematic vision and consistent implementation of detailed solutions in cooperation with all interested partners will make it possible to use the institution of consumer ombudsmen to its full potential.

Key words: consumer; consumer ombudsman; system; reform; local government; district; ADR; OCCP; New Deal.

JEL: K23

LEGISLATION AND CASE LAW REVIEWS

Agnieszka Kowalczyk-Zagaj, **Overview of key legislative proposals of the European Commission concerning the 'New Deal for Consumers'**

Summary: The aim of this study is to analyse legislative amendments in the context of the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'New Deal for Consumers' announced by the European Commission on 11 April 2018. The methodology of the revision corresponds to the legislative amendments proposed by the Commission in particular legal acts. Presented first are thus amendments to Directive 2005/29/EC on Unfair Commercial Practices, followed by Directive 2011/83/EU on consumer rights. A proposal of a directive on representative actions to protect the collective interests of consumers is discussed subsequently. The summary of the review assessed the most significant changes from the point of view of consumers and entrepreneurs

in the context of the current practice of the functioning of the provisions of the amended legal acts.

Key words: new deal; consumer protection; unfair commercial practices; consumer rights; representative actions.

Elwira Macierzyńska–Franaszczyk, **Digital content under European and Polish law**

Summary: This paper deals with the issue of defining digital content in existing as well as planned European and national legislation. The term ‘digital content’ was defined for the first time in EU law in Article 2 point 11 of Directive 2011/83/EU as ‘data which are produced and supplied in digital form’ – this definition corresponded to the postulate of technological neutrality. Similarly, a broad approach to digital content has been adopted under the Common European Sales Law (CESL). The scope of ‘digital content’ is adjusted in some legal definitions to the needs of a given legal act. Such autonomous definition is found in Article 4 point 43 of the Directive (EU) 2015/2366 on payment services in the internal market. The consequence of a widespread usage of the term ‘digital content’ or ‘digital services’ is its incorporation into an increasing number of legal acts. Adopting different scopes of multiple definitions of the same, rather universally understood term, although practiced in legislation, does not support legal transparency. Difficulties which could arise from such practices seem to have been noticed by the EU legislator. The newly proposed amendments to Directive 2011/83/EU, which constitute part of the ‘New Deal for Consumers’, aim to unify the way of defining ‘digital content’ and ‘digital services’. For this reason, as well as due to the variability of the forms of digital content and digital services, the creation of definitions departing from the common understanding, be it autonomous or casuistic, should be avoided on the European as well as national level.

Key words: Digital content; digital services; consumer protection law.

Katarzyna Lis-Zarrias, **Consumer protection against unfair commercial practices in the light of the request for a preliminary ruling from the Supreme Court (Poland) – case C-628/17 Orange Polska S.A.**

Summary: In September of 2017, the Polish Supreme Court requested a preliminary ruling from the CJEU on the interpretation of Article 8, in conjunction with Articles 9 and 2(j), of 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 (case number: C – 628/17 Orange Polska S.A.). In the context of the questions referred to the CJEU, this article aims to draw attention to the importance of the circumstances of a given case, which have impact on the decision of a national court deciding on the character of business-to-consumer commercial practices. The assessments focus on possible consequences of certain commercial practices in the case of distance contracts on telecommunication services, in particular concerning trader’s failure of pre-contractual information. Furthermore, the article shows how a detailed analysis of each set of case circumstances (concerning the type of contract, its subject and means of distance communication used) is indispensable for the national court to assess if a given commercial practise qualifies as aggressive in the meaning of Article 8 of Directive 2005/29/EC.

Key words: distance contract on telecommunication services; aggressive commercial practises; undue influence.

Wojciech Janik, ***Mens rea* as the requirement of unfairness of a commercial practice. Comment to the judgment of the Warsaw Court of Appeals of 8 March 2018, VII AGa 1356/18**

Summary: In this article the author analyzes the judgment of the Warsaw Court of Appeals delivered on 8 March 2018 (VII AGa 1356/18) focusing on the principle of guilt, as the legal requirement of unfairness of a commercial practice. The court's decision may be of great significance as far as the enforcement of Directive 2005/29/EC is concerned, as it restates the traditional approach to unfair commercial practices, which regarded them as strict liability offences. The author is trying to establish whether imposing on consumers an obligation to provide evidence of a wrong intention, on the part of the professional, guarantees the full effectiveness of the Unfair Commercial Practices Directive and, in particular, if it complies with the requirement to ensure a high level of consumer protection, stipulated in Article 1 of the UCPD.

Key words: consumer protection; unfair commercial practices; *mens rea*.

Aleksandra Drożdż, **Review of the decisions of the President of the Office of Competition and Consumer Protection regarding infringements of collective consumer interests on the financial services market in 2017**

Summary: This review presents the latest decisions of the President of the Office of Competition and Consumer Protection regarding infringements of collective consumer interests on the financial services market. It describes the often-used practices of financial institutions, which have been recognized by the President of the Office of Competition and Consumer Protection as violating these interests.

Key words: Office of Competition and Consumer Protection; consumer; collective consumer interests; financial services.

BOOK REVIEW

Geraint Howells, Christian Twigg-Flesner, Thomas Wilhelmsson, **Rethinking EU Consumer Law**, Routledge 2018, pp. 356 (Agnieszka Kubiak-Cyrul)

REPORTS

Report from the 5th International Academic Conference on 'The Influence of Legal and Ethical Norms on the Application of Consumer Law' (Kraków, 1–2 March 2018) (Piotr Kukuryk)

Report on the Symposium '25 years of the Act on Combating Unfair Competition', Łódź, 16.03.2018 (Agata Sobusiak, Alicja Tarkowska)

Report on the Conference 'Intellectual Property Law – Competition – New Technologies', Warszawa, 24.04.2018 (Adrianna Michałowicz, Agata Sobusiak)

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