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Abusive clauses in consumer and insurance contracts – Recent developments in Europe

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Abstract

Consumer law has undergone a profound change in Europe in the recent years. Since the 1970's the scope of consumer protection has been widening very fast. This development had been triggered by the macroeconomic and microeconomic challenges and needs of the European market regarding the sale of goods and the provision of services. Problems found in the market were mostly identified where contracts with a consumer had not been individually negotiated. This also applied to insurance contracts.

Many similarities can be found in the actions for consumer protection against the abusive clauses undertaken in the European Union member states, recently. This relates, *inter alia*, to the harmonisation of the matter under the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. Recent developments in abusive clause regulations in the EU member states throughout its extent coincide with recent interpretation of terms of the insurance contracts, that became very restrictive as well. The change of the attitude towards the interpretation of contractual clauses can be seen on the national legislation level. It is mainly connected with the need to adapt to meet the requirements of the European Union directive harmonising the issues regarding the unfair terms in member states. This resulted in the lists of abusive or suspicious clauses in the national statutory legislation and, in some legislations, special registers of prohibited clauses operated by national courts or other bodies. Depending on the national legislation structures and general legal structures, some of the member states applied also other measures in this respect e.g. automatic nullity of the abusive clauses, bans on the use of such clauses. Also, collective actions of cessation and activity of authorities for consumer protection and supervisory

bodies in forms of reports and direct penalties imposed on entrepreneurs, have been implemented in some of the member states. The majority of measures are of a coercive nature, but recently companies tend to be persuaded to meet adequate consumer standards without legal proceedings being undertaken against them. A number of informative publications on abusive clauses of national or international character became a tool for both, the consumers and entrepreneurs in the European Union to avoid entering into contracts containing or proposing wording that could be treated as abusive clauses. This article aims at presenting some of the developments regarding protection against abusive clauses in consumer and insurance contracts in terms of the measures undertaken by the EU member states in the last few decades.

Key words: abusive clauses, unfair terms, consumer protection, consumer rights, imbalance of rights and obligations

1. INTRODUCTION – EVOLUTION OF THE EU CONSUMER LAW IN THE SCOPE OF ABUSIVE CLAUSES AND ITS IMPACT ON THE INSURANCE MARKET

There has been a major development regarding protection against abusive clauses in consumer and insurance contracts in the EU member states, recently. The level of consumer protection has gradually increased since the 1970's and, since that time, the regulations concerning unfair terms have grown in importance in respect to consumer matters. There is no doubt that, the issue of unfair terms has an important impact, especially on those areas in which consumer contracts are not individually negotiated. Since most insurance agreements are based on general insurance terms and conditions, although consumer protection

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regulations regarding abusive clauses encompass all contractual relationships, they can have a particularly significant impact on insurance agreements (Borselli, 2011, 36-42).

There is no doubt that consumer-related issues have become one of the most important subjects on the insurance market throughout Europe. This relates to all aspects of issues and may be caused by, or at least related to, the macroeconomic and microeconomic challenges and changes in the markets¹. It also has a strong connection to the need for consumers to be treated fairly and transparently in all contractual relationships, including the sale of goods and the provision of services.

Before discussing the recent developments in abusive clause regulations in consumer and insurance contracts, it may be worth reviewing how quickly, and to what extent, the regulations have grown and what caused such an increase.

Before the 1970's there were relatively few legal acts in the field of consumer protection. It seems that the first interventions of the European Community on behalf of consumers took place in the mid 70's when the first Consumer Policy Strategies² were adopted. Since that time a lot has changed.

Between the years 1987-1993, many important pieces of legislation were adopted in the European Community including the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (Directive).³ This act plays an important role in the evolution of the regulations regarding consumers' rights in general and in specific branches, e.g. regulations regarding consumers on the insurance market.

Since 1999, when the Treaty of Amsterdam⁴ was adopted, community education and the representation of consumers as well as the promotion of their interests have been clearly identified as new targets for the EU. The idea of consumer protection has also been implemented in the EU insurance directives.

¹ For further reference regarding historical and current data about the consumer sector industry, including the insurance industry, please see: OECD. (2012). *Global Insurance Market Trends*.

² Issues of consumer protection in the insurance market available at: http://www.knf.gov.pl/Images/forum606_tcm75-4918.pdf, 13-160, 29 March 2013.

³ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, *Official Journal*, L 95.

⁴ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and related Acts dated 10 November 1997, *Official Journal* C 340.

While the start regarding regulations on the protection of the weaker party to the agreement in both, consumer and insurance contracts, was quite slow and controlled, the regulations concerning abusive clauses have become very restrictive. What more, almost every year, the variety and complexity of measures widens and spreads to more and more areas of such a protection. Therefore, in order to understand the development in terms of abusive clauses in consumer and insurance contracts, it is useful to start at the point of general conditions established by the Directive for the terms of an agreement to be considered as abusive clauses in consumer and insurance contracts.

2. EU DEFINITION OF ABUSIVE CLAUSES AND UNFAIR TERMS

The definition of an unfair term has been stipulated in the Directive. According to this Act "a term not individually negotiated is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

This definition is supplemented by another provision stating that "an assessment of unfair nature will not apply to the main subject matter of the contract or to the adequacy of the price and remuneration of the goods or services supplied in exchange, provided that these terms are in plain, intelligible language."⁵ As explained above, the issue of intelligible language has always been an important indicator for the assessment of whether a given clause is abusive. Also, paragraph 19 of the Preamble of the Directive provides for further directions regarding abusive clauses. Namely, "for the purposes of the Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied. However, the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms, from which it follows that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment. This is because these restrictions are taken into account in calculating the premium paid by the consumer."⁶

⁵ Issues of consumer protection in the insurance market available at: http://www.knf.gov.pl/Images/forum606_tcm75-4918.pdf, 13-160, 29 March 2013.

⁶ Available at: [skemman.is/is/stream/get/1946/11508/28500/8/Table_of_contents\\$002c_thesis\\$002c_bibliography_and_table_of_cases.pdf](http://skemman.is/is/stream/get/1946/11508/28500/8/Table_of_contents$002c_thesis$002c_bibliography_and_table_of_cases.pdf), 29 March 2013.

According to article 6 of the Directive, “Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

On the basis of the above, regardless of whether the contractual term is referred to as an abusive clause or an unfair term, for the purpose of this article, the meaning of both expressions is to be the same (Rodrigues-Young, 2011).

3. IMPLEMENTATION OF THE DIRECTIVE BY THE EU MEMBER STATES

According to the Directive, the UE Member States may individually regulate the measures for the discontinuance of unfair terms in general use, including administrative measures, collective court proceedings and criminal proceedings. They are also responsible before the Commission for the enforcement of European consumer standards (Schulte-Nölke, Twigg-Flesner, Ebers, 2008).

It is worth mentioning that in some EU member states there were no express regulations regarding unfair terms in consumer contracts before the transposition of the Directive – e.g. Malta, Italy, Ireland, Estonia, or the Czech Republic, etc (Schulte-Nölke, Twigg-Flesner, Ebers, 2008). However, some of the EU member states had separate regulations regarding the use of unfair terms in consumer contracts even before the Directive was adopted (Schulte-Nölke, Twigg-Flesner, Ebers, 2008). As an example, Germany had comprehensively regulated this issue in the Act Concerning the Regulation of the Law of Standard Business Terms since 1977 (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*). Luxemburg had also adopted compressive regulations on unfair contract terms quite early – in the Consumer Protection Act of 1983 (*Loi du 25 août 1983 relative à la protection juridique du consommateur*).

It should be noted that actually, Germany was the precursor in consumer law in Europe (Union des Consommateurs, 2011, 60). It started in 1965 with the *Act against Misleading Advertising* (*Das Gesetz gegen den unlauteren Wettbewerb*). In 1976, this act was followed by further legislation – the Act on the General Conditions of Sales (*Das Gesetz zur Regelung des Rechts des Allgemeinen Geschäftsbedingungen*). The German regulation protected both natural and legal persons against unfair pre-formulated contract

clauses. It provided for a definition of “ineffective clauses” (i.e. unfair) as well as a catalogue thereof (Union des Consommateurs, 2011, 61). This system, which combined a general definition and a list of specific clauses, inspired other European countries and European legislation (Union des Consommateurs, 2011, 61). The collective action of consumer associations was introduced in 1965, and, as a result of their activity contract clauses could be declared as “ineffective.” Individual consumers were also able to initiate such actions, but the obtained judgment could not go on to have a broader application (Union des Consommateurs, 2011, 62). However, this changed due to the transposition of the Directive. The above act was abrogated in 2002 and integrated into the Civil Code without any substantive changes (Union des Consommateurs, 2011, 63).

In the United Kingdom, regulations regarding unfair terms were also adopted very early, in 1977, in the Unfair Contract Terms Act. The Office of Fair Trading was also created at that time. When the Directive was adopted, the British legislation reproduced it in a very careful way in the Unfair Terms in Consumer Contracts Regulations, first in 1994, and then in 1999 (Union des Consommateurs, 2011, 51).

In the Netherlands, the regulations on consumer protection are included in the Dutch Civil Code dated 1992, which have been integrated with the Regulations of the Directive. The Dutch Civil Code provides for a specific concept of “reason and fairness”, which is above the freedom of contract rules (Union des Consommateurs, 2011, 69) and which was introduced into many parts of the Dutch Civil Code. In addition, the Dutch Civil Code provides for the construction of “voiding abnormally onerous clauses.” The provisions of law provide for a certain “level of normality” beyond which a given contractual clause that is to the consumer’s disadvantage becomes void. The provisions of law include a number of criteria, enabling the relevant assessments (Union des Consommateurs, 2011, 70–72).

In France, the concept of unfair clauses in contracts between professionals and consumers became the law in the so-called “loi Scrivener” (*Loi n° 78-23 du 10 janvier 1978 sur la protection et l’information des consommateurs de produits et de services*)⁷ in 1978. This regulation stated that a clause could be declared unfair by a decree from the Council of State (Union des

⁷ Available at:

http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=4E8118D6B62DA330C072263C23116AA4.tpdjo02v_3?idArticle=LEGIARTI000006504511&cidTexte=LEGITEXT000006068627&dateTexte=19780111, 30 October 2013.

Consummateurs, 2011, 63). However, over a period of 17 years only a single decree was issued and the system was deemed a failure due to its excessive complexity. The so-called “Code de la consommation” of 1997 codified the legislative and regulatory part of consumer law. However, the “Code de la consommation” only constituted a simple compilation of existing legislative and regulatory texts with no modifications which was highly complex for non-experts (Union des Consommateurs, 2011, 64). The legislation was subject to more changes due to the transposition of the Directive in 1995 and went further than the Directive in applying whether contract stipulations were freely negotiated, or not (Union des Consommateurs, 2011, 66). The so-called “Loi L.M.E.” (*Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie*)⁸ of 2008 provided for two lists of unfair clauses depending on the features and conditions related to the terms of the contract (Union des Consommateurs, 2011, 67).

In Poland, there were a number of regulations regarding unfair terms in the Polish Law of Obligations (*Decree of the President of the Republic of Poland on 27 October 1933 The Law of Obligations*), but they were different to those provided by the Directive – they only referred to the contractual clauses adopted by the public authorities. From 1964, when new Civil Code was adopted, there was no such regulation until the year 2000. Poland implemented the Directive by introducing the Act dated 2 March, 2000 on the protection of certain rights of consumers and on the liability for damages caused by dangerous products. The said Act was implemented much earlier than Poland joined the European Community in May 2004. Apart from implementing the Directive, the said Act also implemented the provisions of the Directive of 20 December, 1985 to protect the consumer in respect of contracts negotiated away from business premises and the Directive of 20 May, 1997 on the protection of consumers in respect of distance contracts.

It should be noted that the legal understanding of an abusive clause, despite the definition in the Directive, can be different, depending on the jurisdiction. In several jurisdictions only clauses contained in certain types of contract can be considered as abusive (Union des Consommateurs, 2011, 83). For example; only clauses from contracts concluded between a consumer and an entrepreneur, and not individually negotiated, can be reviewed and, after such a review, treated as abusive. This option has been adopted in the United Kingdom, Ireland, Spain, Greece, Italy, Bulgaria, Cyprus, Poland, Romania and Slovakia. In other countries a type

of a contract that can be examined from the point of view of an abusive clause is much wider - for example in Denmark, Finland and Sweden, the possibility of reviewing the content of a contract in terms of abusive clauses relates to all contracts, including those concluded between entrepreneurs. In these countries individually negotiated terms can also be subject to review (Union des Consommateurs, 2011, 83).

Therefore, there is no uniform approach of the implementation of the Directive in various EU member states – the differences regard many areas, including the scope of the definition, the list of abusive clauses and the kind of clauses that can be verified from the point of view of their abusiveness.

4. MEASURES TAKEN IN THE EU MEMBER STATES FOR THE DISCONTINUANCE OF UNFAIR TERMS IN GENERAL USE

Regardless the tradition of a legal system in a particular EU member state, i.e. whether it was a statutory civil or common law system, issues raised before the courts and the measures taken by regulatory bodies in term of abusive clauses seem to be very similar.

Obviously, the similarities in regulations in various member states arise from the regulations of the Directive itself, but they may also be caused by global tendencies. Consumer protection is not just an idea appearing in legal acts, but is a range of actions undertaken by the supervisory authorities, including the insurance market.

In order to obtain an effective consumer protection, preventing multiplication of lawsuits, member states aim at discontinuance of unfair terms in general use. Discontinuance means any kind of elimination of the unfair terms from the market. The remedies known and applied are of legislative, judicial or administrative nature as well as “self-regulation” of the market.

One of the legislative measures for the discontinuance of the use of unfair terms is through the introduction of black and grey lists of unfair terms. In general, one may say that the “grey” list is a list of suspicious clauses (clauses which validity depends on the particular conditions of the given case), whereas the “black” list is a list consisting of wholly void clauses (clauses which invalidity is not subjected to any particular assessment).

For example, the Polish Civil Code lists only grey clauses. If a contractual provision contains a clause that meets the criteria indicated in the Civil Code, there is a great probability that it will be recognized as a wrongful

⁸ Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019283050>, 30 October 2013.

contractual provision (abusive clause). The Civil Code list contains 23 examples of such clauses, e.g.: provisions that exclude or limit the liability to the consumer for personal damages; that “exclude or substantially limit the liability to the consumer for the non-performance or improper performance of an obligation; that allow a party contracting with the consumer to transfer the rights and duties resulting from the contract without the consent of the consumer, or that make the conclusion of a contract contingent upon the consumer’s promise to enter into further similar contracts in the future, or depend purely on the will of the party contracting with the consumer” (Jurkiewicz, 2006, 18). This list has been prepared on the basis of the Attachment to the Directive.

The list of grey and black clauses is included in the legislation of Germany and the Netherlands (Schulte-Nölke, Twigg-Flesner, Ebers, 2008, 361 and 368). The Dutch Civil Code contains two lists of clauses deemed or presumed to be abnormally onerous – a black list (irrefragable presumption), and a grey list – simple presumption (Union des Consommateurs, 2011, 71).

From the perspective of judicial and administrative measures point of view - some EU member states, including Poland, Portugal and Spain (Schulte-Nölke, Twigg-Flesner, Ebers, 2008, 424) provide for register of standard terms / register of prohibited clauses, in which they publish the standard terms that have been considered to be unfair / abusive. Such registers are usually open and freely accessible. Parties or potential parties to many contracts can review the list of abusive clauses and check if such a clause or a similar one exist in contracts they intend to execute or already executed.

The law of the relevant EU member state that introduced a concept of a register of unfair clauses, usually provides for the relevant procedures on the entry of contractual clauses to such a register. Regulations in this respect may differ, but their aim remains the same – the widest publication of the clause that can be understand as unfair. As an example, in Poland, the law provides for the possibility of submitting a claim to the Court of Competition and Consumer Protection (*Sąd Ochrony Konkurencji i Konsumentów* – the CCCP) which decides on the entry of a given clause to the register of prohibited clauses (*Rejestr klauzul niedozwolonych*). The register is maintained by President of Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów* – the OCCP). It is publicly available on the OCCP’s website.⁹ Currently, there are 4,485¹⁰

abusive clauses in total including approximately one hundred clauses from insurance contracts which have been entered into this register. It is the CCCP which decides whether a given provision shall be treated as abusive. In principle, anyone that could potentially conclude a contract with an entrepreneur on the basis of the general terms and conditions (not negotiated individually) can file a claim to the court (Code of Civil Procedure, 1964, art. 479). Such a right has also been granted to social organizations whose statutory duties include the protection of consumer interests, local (city) consumer affairs commissioners, and the President of the OCCP. Consumers may obtain assistance from a local consumer ombudsman, or from one of the state-funded consumer organizations. An insurance company, as an entrepreneur, may also be subject to an administrative proceeding before the OCCP, if it has been established that the practice of the said insurance company infringes the so-called collective consumers’ interests. Such practices consist of, e.g. infringing the rules on transparency, or using unfair terms within a contract. From the point of view of the insurers, it is also important that, the OCCP conducts reviews of the general insurance terms and conditions, from time to time. When a clause in an insurance contract is considered to be unfair, the OCCP usually brings a judicial action to the CCCP for the recognition of the questioned provision as being abusive. The OCCP has been very active in the scope of proceedings against insurance companies, recently, publishing several reports¹¹ on its website¹² regarding abusive clauses in insurance contracts. The activity of the OCCP resulted in a lot of clauses from insurance contract to be included in the register. It is important to note that, the clause cannot be used and is treated as non-existing between the parties, from the date of the entry to the register. In other words, the questioned provision does not have any legal effect. The ineffectiveness of the clause that results from the entry to the register may have a more serious consequence, called “a wider legal effect”, in a sense that other entities (entrepreneurs) cannot use

⁹ Available at: http://www.uokik.gov.pl/rejestr_klauzul_niedozwolonych2.php, 10 April 2013.

¹⁰ As of the day of 11 April 2013.

¹¹ In 2004 the OCCP analysed the general terms and conditions of CASCO Insurance in the scope of abusive clauses (*Raport z kontroli wzorców umownych stosowanych na rynku ubezpieczeń komunikacyjnych*, 2004). In 2006 the OCCP reviewed the general terms and conditions of the insurance used by insurers operating in Poland within life insurance and non-life insurance. In September 2006 the OCCP published a report of that investigation (*Raport z kontroli wzorców umownych stosowanych przez zakłady ubezpieczeń*, 2006). Also in 2010 the OCCP published a report regarding the general terms and conditions of life insurance.

¹² Available at: <http://www.uokik.gov.pl/raporty2.php>, 12 April 2013.

such provisions in their model agreements concluded with consumers. There have been discrepancies in court verdicts on the “wider effect”¹³ – some of them questioned the idea of the “wider effect”, some of them confirmed that any abusive clause included in the register will apply to any entity and consumer.

Poland also provided sanctions for those entrepreneurs that, despite the entering of a given clause into the register of abusive clauses, keep using such clauses, or those of a similar nature in their relationships with consumers¹⁴. In such a case, the OCCP may initiate administrative proceedings against such an entity on applying practices that infringe the collective consumers’ interests.

In other EU member states, there are various bodies that have the power to act on behalf of consumers by being able to declare a clause as abusive. In the United Kingdom one of such bodies is the Office of Fair Trading. One of its mandates is to examine any complaint about the unfair nature of a clause contained in a pre-formulated consumer contract. It can then initiate an action for discontinuance against a company with regard to such clause (Union des Consommateurs, 2011, 53). Also in the UK, similar aim of consumer protection is executed by the Consumers’ Association¹⁵. The Consumers’ Association has not availed itself of the power to go to court, but can have any unfair clause examined by the Office of Fair Trading by using a fast procedure known as the “super complaint” (Union des Consommateurs, 2011, 54).

It seems that in some EU member states the administrative authorities work towards reasonable negotiations. For example; in the United Kingdom the “Office of Fair Trading has been very active in approaching traders about terms which may be unfair and has successfully persuaded them to change their terms. It regularly publishes an Unfair Contract Terms Bulletin¹⁶ in which it provides details of the terms it has dealt with in this way.”¹⁷ This may be a helpful tool in reviewing and amending the general insurance terms

and conditions by the insurers, before they introduce any changes to their products.

Some of the EU member states prefer other options – including self-regulation. For example, in the Netherlands, there is an extra-judicial proceedings before Consumer Dispute Sector Boards (*Geschillencommissies*), which became very common.¹⁸ There are separate Boards for different sectors which are gathered within the Consumer Complaint Boards Foundation. The Board investigates the claims of consumers and issues enforceable decisions. The courts’ control over such decisions is limited, as they only intervene if the decision is absolutely unreasonable (Union des Consommateurs, 2011, 72). Self-regulation became a very common remedy regarding the insurance sector also in Poland. The Polish Banks Association and the Polish Insurance Association issued recommendations on good practices in Bancassurance, which deal with the newly appearing issues of the market. In terms of voluntary regulations on the EU level, the Principles of European Insurance Contract Law which establish a voluntary insurance contract law regime across the EU, were published in December 2007.¹⁹ The Project Group “Restatement of European Insurance Contract Law” aim was to draft a European Insurance Contract Act that not only follows the idea of insurance laws of the EU Member States, but also takes into account the interests of an internal insurance market. The draft Principles on European Insurance Contract Law (“PEICL”) have been issued in 2009. The act discusses the issue of abusive clauses in its article 2:304.

In terms of activity on the EU level, it should be noted that on 8 June 2011, “the European Parliament delivered its Resolution on policy options for progress towards a European Contract Law for consumers and business, which advocates the adoption of an Optional Instrument including Insurance Contract Law based on the PEICL.”²⁰ The works of the Restatement Group somehow resulted in decision of the European Commission on the setting up the Commission Expert Group on the European Insurance Contract Law, in 2012.²¹ Although the aim of the newly established

¹³ As an example please see the following rulings of the Supreme Court in Poland: ruling dated 20 June, 2006 file no. III SK 7/06 and ruling dated 13 July, 2006 file no. III SZP 3/06, also rulings presenting the opposite point of view, e.g.; ruling dated 7 October, 2008 file no. III CZP 80/08, ruling dated 13 January, 2011 file no. III CZP 119/10, and ruling dated 12 April, 2011, file no. III SK 44/10.

¹⁴ Rulings of the Supreme Court in Poland dated 13 July, 2006, file no. III SZP 3/06.

¹⁵ Available at: <http://www.which.co.uk/>, 10 April 2013.

¹⁶ Available at: <http://www.offt.gov.uk/713560/publications/guidance/unfair-terms-consumer/>, 10 April 2013.

¹⁷ Available at: http://www.eu-consumer-law.org/consumerstudy_part2c_en.pdf, 29 March 2013.

¹⁸ Available at: http://uniondesconsommateurs.ca/docu/protec_conso/EndAbusiveClauses.pdf, 72-106, 29 March 2013.

¹⁹ Available at: <http://restatement.info>, 30 October 2013.

²⁰ Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0262>, 30 October 2013.

²¹ Decision of the European Commission dated 17 January 2013 on setting up the Commission Expert Group on a European Insurance Contract Law, (2013/C 16/03). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:016:0006:0008:EN:PDF>, 30 October 2013.

group is not directly connected with the consumer protection in insurance, as it should conduct “analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle in cross border trade”²², but taking into account the consumer related issues, including abusive clauses, its works seem to be inevitably connected with the discussed matter.

Regardless the academic works on the insurance and consumer related matters that could have an impact on the abusive clauses legislation and practice, also practical developments should be mentioned here. There have been several international projects in respect of the issue of abusive clauses across Europe. One of them was CLAB – The European Database on Unfair Terms in Consumer Contracts. This was a publicly available on-line database with over ten thousand judicial and non-judicial decisions on abusive clauses (concerning the EU and Norway).²³ It was a valuable tool for both practitioners and academics dealing with European comparative law. The said database was a noteworthy development as it allowed finding useful conclusions regarding the case law on standard terms in consumer contracts from both national and European Community law perspective (Micklitz, Radeideh, 2005, 325–360; Bright, 2000, 331–352). Unfortunately, the database is no longer in force.

The second international project is connected with the EC Consumer Law Compendium. This is an ongoing research project which has been conducted by an international research group on behalf of the European Commission since 2004. It provides information on eight consumer law directives and their transposition into the laws of the EU Member States, including case-law, bibliography and comparative study.²⁴

5. RECENT ISSUES RAISED IN EUROPE IN THE SCOPE OF UNFAIR TERMS

One of the most frequently raised issues in the scope of unfair terms that have recently appeared in the EU member states refers to intelligible language in contracts for consumers. The conclusions that were made in the relevant contractual cases (in various legal relationships) can also apply to insurance.

²² Available at: http://ec.europa.eu/atwork/pdf/execution_report_2013.pdf, 30 October 2013.

²³ Available at: <https://adns.cec.eu.int/CLAB>, 12 April 2013.

²⁴ Available at: <http://www.eu-consumer-law.org>, 29 March 2013.

For instance, one of the most striking examples of unfair terms in this area was in Hungary²⁵ and regarded the unfairness of a unilateral amendment of fees without clearly setting out the method for fixing those fees, or specifying a valid reason for that amendment. The conclusion was that the judge was required to determine, among other things, whether, in light of all the terms in the general business conditions and of the national legislation supplementing those general business conditions, the reasons for, or the method of, amending the fees was set out in plain, intelligible language and whether the consumers had the right to terminate the contract.

A case regarding the issue of plain language and the clarity of the clause was also raised in Spain.²⁶ The Association of Users of Banks, Saving Banks and Insurance Services, known as ADICAE (*Asociación de Usuarios de Bancos Cajas y Seguros*)²⁷, brought about a collective action of cessation against Caja Rural de Valencia in order to avoid the use of a clause in VC investments which defined the financial risk of the product. ADICAE demanded the nullity of this “unfair contract term” and to pay back the loss caused by these contracts. It claimed that this financial product was offered in an indiscriminate and careless way, without explaining (in most cases) that it was not a regular fixed term deposit, but a product in which a total or partial loss of the investment was possible. In this case the Court of First Instance and the Court of Appeal declared both the nullity and elimination of the clause due to its absence of clarity and lack of use of plain language. The courts claimed that the clause was unfair and therefore void making extensive use of small print and intricate technical language which impeded its correct comprehension. The defendant had to refund the amounts that were charged on the basis of this clause.

One of the cases regarding unfair terms due to the language used within the agreement was discussed also on the Polish insurance market.²⁸ The clause in the general terms and conditions was questioned as abusive because it could be considered incomprehensible for consumers. The Polish court claimed that by reference to the language of insurance mathematics known

²⁵ European Court of Justice (EU) 26. Apr. 2012 C 472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt (HUN)*.

²⁶ Tribunal Supremo (ES) 22. Dec. 2009 834/2009 *Asociación de Usuarios de Bancos, Cajas y Seguros (ADICAE) v. Caja Rural de Valencia*.

²⁷ Available at <http://adicae.net/>, 12 April 2013.

²⁸ Judgement of the Court of Appeal dated 13 May, 2009, VI ACa 1365/08.

only to “a small circle of people who are insurance professionals” the insurer required the consumer to pay a grossly exaggerated compensation. According to the court, the specialised term of the percentage of mathematical reserves remains unknown for a standard consumer because it neither exists in the provisions of law, nor was it explained in any place within the contract, which according to the Court of Appeal also allowed for an arbitrary and unverifiable determination of the amount due to the insurer by the insured for cancellation of the contract. The court did not explain, though, how to provide the relevant information to the customer in a plain language. Sometimes, it seems to be impossible or may require long descriptions that may not be appreciated by the customers. Taking into account the need of a plain language and the necessity to provide the relevant explanations to the consumer, the issue remains unsolved.

Another most recent legal issue in Poland concerns surrender fees (liquidation fees), which are described as the costs of early termination of the policy in case of unit linked insurance products. Due to many reasons the policyholders decide to terminate their unit-linked policy earlier than expected at the conclusion of the insurance contract. Usually, the cost of such resignation decreases depending on the term of the policy in force. There has been a number of judgements made by the CCCP regarding the unfair terms in the general terms and conditions of insurance policies²⁹ related to this problem, in the last few years. Most of the judgements regarding this issue in Poland referred either to the matter of transparency (language), or unjustified obligations imposed on the policyholders or the insured. For example, the following clause has been treated as abusive: “Liquidation fee (the cost of surrender on funds collected in ORJU of regular premiums) – in case of complete or partial surrender of the insurance certificate – 100%, if the regular premiums were jointly paid for less than one year.”

This clause was subject to the judgment of the Court of Appeal dated 14 May 2010, VI ACa 1175/09. The court considered the liquidation fee as a penalty imposed by the insurer for early termination of a unit linked insurance contract with no real proportion to actual expenses that the contract entailed to the insurer. This matter has been widely discussed on the Polish insurance market, the insurers trying to explain that the liquidation fee should not be understood as a penalty but is merely connected with the payment of the upfront agency fee that needs to be borne by the insurer. This has not been accepted as a good argument

²⁹ Judgment of the Court of Appeal dated 26 June, 2012, VI ACa 87/12.

by the Polish courts and the insurers need to take such a decision into account while executing their insurance documentation.

In Spain, a similar clause regarding disproportionately high sum as compensation for termination of the contract that was declared unfair due to the decision of the Tribunal Supremo (ES) 08. Apr. 2011 203/2011 Carlos María v. Celia.³⁰ The questioned clause reads as follows: “If under any circumstance D. Anselmo (the defendant) would decide to terminate the contract, the fee will remain a 15% of his share of the inheritance.”

The Tribunal decided that a term which imposes a penalty clause when withdrawing from a contract for services, is contrary to the requirement of the good faith and causes a significant imbalance to the detriment of the consumer. These cited clauses are only an example of the recent court decisions.

Another issue recently raised in insurance sector in Europe in terms of abusive clauses regards a relationship between the insured risk and the exclusions in general terms and conditions. This problematic area is commonly known as pre-existing conditions or the exclusions based on pre-existing conditions. As an example, the following clause, being subject to the judgment of the CCCP dated 19 September 2011, XVII AMC 145/10, can be presented: “The liability of the insurer in respect of an occurrence of a serious illness of the insured applies only to those types of serious illnesses that had not occurred prior to the conclusion of the additional insurance contract with respect to the risk serious illness.”

It is generally known that a pre-existing condition means a disease or a state of health of the insured diagnosed or treated within a specified time prior to the conclusion of the insurance contract or prior to the start of the insurance cover. Clauses of pre-existing conditions are quite common in any insurance contracts, but they are actually inevitable in group insurance contracts in Poland, the most popular example of which are the PPI (payment protection insurance) products. In this kind of contracts, the insurer does not and cannot carry out an individual risk assessment, i.e. it neither asks for or analyses the medical history of the insured. It is noteworthy that while in Poland the clauses regarding pre-existing conditions became questioned and tried to be declared unfair, provisions of French law clearly allows for the use of clauses regarding pre-existing conditions in certain types of insurance contracts, including payment

³⁰ Available at: http://www.icab.es/files/242-311778-DOCUMENTO/STS_4_2011_ClausulaAbusivaHojaEncargo.pdf, 30 October 2013.

protection insurance policies (Szczepaniak, Whitehead, 2013, 13).

SUMMARY

Important changes and developments regarding abusive clauses in consumer and insurance contracts took place, recently. They relate to both, regulations of legislative or self-regulatory nature as well as counteracting abusive clauses in practice. Measures undertaken in the EU member states are converging, but it is difficult to see one and international remedy.

Many similarities can be found in the actions taken within the European Union in order to protect consumers from unfair contractual terms on the insurance market, including the implementation of the Directive itself or introducing various registers of abusive clauses. However, there are also some differences – one of them being the approach of the supervisory bodies and the measures taken by them. They can be divided into measures of coercive nature, and the preventive nature. Comparing Poland and the United Kingdom in respect of such approach leads to an interesting conclusion.

In Poland, the OCCP has performed many proceedings towards insurance companies regarding the use of unfair terms and has brought many to the CCCP. In consequence, more than hundred clauses from insurance contracts have been entered into the register of prohibited clauses. The OCCP reviews the general terms and conditions available on the market, including insurance contracts, and the clauses are questioned on a daily basis on pain of introduction to the register and of a fiscal penalty towards the insurers. Different approach has been applied in the United Kingdom. According to the British Office of Fair Trading's policy, court proceedings are considered only as a last resort (Office of Fair Trading, 2008). The companies are persuaded to meet adequate consumer standards without litigation. Such approach is valuable in the recent times when alternative dispute resolution is commonly used.

Despite a number of discrepancies in the practices in the Member States, it seems that all of the measures are undertaken to reach the more and more restrictive legal regulations and court decisions in respect of abusive clauses. This is a global tendency, although sometimes differently approached, but aimed at the same protection for consumers, policyholders and insurers.

It should also be highlighted that the implementation of the Directive and its performance by the EU member

states has had an important impact for consumers. It resulted in the improvement of the knowledge of fundamental consumer rights among consumers in each of the member states. On the other hand, it also resulted in a more consumer friendly approach from entrepreneurs, including insurers. While drafting documentation regarding an insurance contract, insurers, as well as other entrepreneurs, need to take into account both, legislative developments as well as practical tools, including registers that contain the abusive clauses, that have already been questioned the supervisory bodies.

Key words: abusive clauses, unfair terms, consumer protection, consumer rights, imbalance of rights and obligations

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