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EVOLVEMENT OF CONSUMER RIGHTS PROTECTION IN POLISH JUDICIAL PROCEEDINGS: NEW SEPARATE PROCEEDINGS

Abstract: *In recognition of the concept of consumer rights to trial, individual and collective consumer rights should be extended across Europe as well as nationally. The need to affirm the procedural position of the so-called vulnerable parties in civil law proceedings is a complex and multifaceted matter. The Polish legislator having devised new separate proceedings in consumer cases is a manifestation of the equalising justice principle having been realised. Regardless, one may well doubt whether the current procedural form comprises a sufficient volume of significant deviations from ordinary proceedings to justify such nature to be conferred upon it. Related deliberations form part of a broader discussion regarding the structure, form, and suitability of Polish procedural law.*

Keywords**:** *consumer, protection of consumer rights, consumer access to justice, civil law, civil proceedings, special proceedings.*

1. Consumer-oriented law – the Polish and EU perspective

Consumer law serves the purpose of establishing fair and decent relations between consumers and businesses relations. The Polish definition of the consumer has evolved; contemporarily, the term is defined as a private individual (natural person) entering into a transaction with a business entity, said transaction not directly associated with his/her economic or professional activity (Rejdak, 2006: 134). Dating back to the 1960s, individual and collective protection of consumer rights plays a hugely important role across Europe and in Poland today. We are witness to a permanent, considerably expansive and continually developing, component of European law (Łętowska, 2004: 8).

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The value of cases involving consumers ties in with their commonwealth aspect; as part of the domestic legal order, European Union law should be accounted for in Poland in civil law proceedings as consumer-oriented proceedings constitute EU law, or are sourced therein. Legal provisions prevalent in individual EU member states ought to be interpreted and recognised within the framework of concepts developed on the European level, in recognition of the so-called consumer access to justice and right to fair trial, principles of EU law equivalence and effectiveness, and the rule of procedural autonomy of member states (Pecyna, 2022: 1028). Consequently, from the vantage point of a Polish lawyer, a consumer's right to a fair trial merits analysis both in the European and domestic perspective (Dybka, 2018: 11). Consumer protection has always been interdisciplinary, under private and public law alike. Yet, dynamic consumer law development over the years has not been balanced. While the level of protection guaranteed across different states has always been diverse (Wróbel, 2005: 42), civil substantive law remains its unquestioned pivot.

Civil law discourse in Poland has been usually interpreted against the backdrop of substantive law instruments of consumer protection, while remaining in the background, as it were (Gajda-Roszczynialska, 2012: 165). Procedural law has been contesting the need for and the purposefulness of generating supplementary legal measures for years (Zembrzuski, 2021: 9). As a result, in terms of consumer rights protection, the Polish Civil Procedure Code (CPC)[1] offers few solutions in terms of resolving such matters differently to other civil law cases. It seems that the need to fortify the consumer's procedural position and protecting him/her against the *"imperfections of the free market"* has not been observed or realised often enough (Samson, 2013: 164).

2. Separate proceedings as a manifestation of improved consumer protection

Gradual European integration notwithstanding, efforts to define and delineate the division of competencies between community and domestic procedural law have triggered the occasional controversy or doubt. It is commendable that the Polish legislator has recently rekindled the related discussion by taking legislative action with intent to make it easier for consumers to pursue claims in court. It has been brought to the lawmakers' attention that, in practice, many individuals harmed by business entities' actions renounce or refrain from seeking redress in judicial proceedings, for a variety of reasons. This in turn has allowed a manifest argument to be put forward, namely that access to justice

1 Code of Civil Procedure Law of 17 November 1964 (uniform text: *Journal of Laws* 2021, item 1805, as amended).

and right to a fair trial remain material components of a system comprising broadly defined consumer protection measures.

Protecting the so-called vulnerable party in civil law proceedings is a multifaceted issue (Zembrzuski, 2016: 843). In procedural law, this notion most frequently ties in with individuals appearing before a court of law self-sufficiently (*pro se*), renouncing services offered by professional legal assistance providers (Zembrzuski, 2011: 777). Most frequently, such persons are unfamiliar with the letter of law, procedural law in particular, in which case we are dealing with the so-called barrier of procedural norm unfamiliarity (Osowy, 2003: 113). The consumer is a vulnerable party as well. In view of the above, the notion of developing procedural solutions to resolve consumer disputes and fortify the consumer's procedural position is both essential and noteworthy. Supporting the vulnerable party in civil law proceedings should be based on respect for principles of equality of parties, disposition, contradictoriness, and other inherent values of contemporary civil law proceedings.

While the Polish legislator has taken action to *"respond to consumer community expectations with regard to expanding the scope of their rights"*[2], the way the assumption has been handled gives rise to certain doubt. The Law of March 9th 2023 to amend the Code of Civil Procedure Law and selected other laws[3] introduces new[4] separate proceedings rather than isolated procedural solutions.

The fact-finding judicial proceedings model ought to be undeviating: examining current cases according to general rules ought to be the rule; separate proceedings should be an exception. Claiming that the number of separate proceedings in Poland is exceedingly high is a cliché.[5] The tendency of multiplying separate proceedings (Ereciński, 2009: 3; Grzegorczyk, 2011: 72) is disquieting: making the course of fact-finding proceedings more complex and distorting the ordinary to separate proceedings ratio[6], it also gives rise to a risk of system

2 See: Justification of the draft Government bill of 9th March 2023 to amend the Code of Civil Procedure Law and selected other laws (item 62, p. 41), hereinafter referred to as *"Justification"* (Rządowy projekt ustawy o zmianie ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw, Druk nr. 2650, Sejm, 27 .9. 2022; https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2650

3 See: https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=7E8A1FF49174B3D2C12588CC005A5F02

4 In recent years, separate proceedings in commercial law cases have been brought back in Poland, and separate proceedings in intellectual property cases have been introduced.

5 Depending on the calculation formula, over a dozen separate proceedings are identifiable in Poland.

6 Over 3 million cases are examined in Poland in separate writ proceedings alone, allowing civil law cases to be tried as orders for payment, i.e. with the contradictory form bypassed.

inconsistencies developing and growing (Ereciński, 2010: 11; Zembrzuski, 2022: 247). The legislator has observed that risk to a certain extent only, disclaiming that provisions concerning other separate proceedings shall be applicable only insofar as they do not contradict provisions of the newly drafted Code section. The prevalence of legal provisions regulating proceedings involving consumers has thus been highlighted.

3. Procedural solutions in cases involving consumers

The intent behind recognising cases involving consumers as particularly significant to society is to introduce special-purposes procedural solutions designed to secure due and proper protection to aforesaid consumers. Notwithstanding the above, newly introduced proceedings involving consumers shall only encompass three expansive regulations (Articles 458^{14}-458^{16} of the Civil Procedure Code). One may well doubt whether the current form of separate proceedings (as introduced) comprises a sufficient volume of significant deviations from ordinary proceedings which may justify their designation as separate proceedings. Said provisions could have just as well been made part of general procedural regulations.

The essence of any consumer dispute involves the other party thereto, equipped with a greater capacity (financial capacity included) to safeguard its own rights. Newly introduced proceedings defines cases objectively rather than subjectively. Pursuant to Article 458^{14} §1 of the Civil Procedure Code, respective provisions shall apply in cases of consumer claims against business entities and in cases of business entity claims against consumers, provided that the given consumer is party to legal proceedings. Cessation of business activities (Zembrzuski, 2009: 22) shall not affect the applicability of the aforesaid regulations (Article 458^{14} §3 of the Civil Procedure Code). The moment of entering into the disputed contract shall determine the consumer's status and the consumer nature of said contract.

Newly introduced procedural mechanisms include solutions improving the *status quo* as well as new procedural structures. The former include regulations concerning local jurisdiction, the attribute of jurisdictional competence extending to the need for disputes to be resolved by courts of law competent in terms of substantive, locality-related and functional mechanisms duly stipulated in procedural law (Zembrzuski, 2020: 1035). In principle, the process of assigning a case to a specific court of law rests on correct procedural qualification in terms of abstract statutory rules, and in recognition of the *actor sequitur forum rei* principle. Granting specific autonomy to parties within the aforesaid scope is occasionally used to the disadvantage of vulnerable or third parties.

Referring legal action to a particular court of law convenient to a specific party, with intent to have the said action heard by the same court, may become a vital litigation strategy component (Zembrzuski, 2021: 5). In terms of consumer judicial access, jurisdiction remains essential, frequently a determinant of the consumer's capacity to exercise his/her rights. To date, the Polish legislator has been safeguarding the consumer against entering into unfavourable jurisdiction agreements (Weitz, 2016: 796) and against court competence-related modifications.[7] Legislative amendments[8] and the pro-consumer interpretation of legal provisions have vastly expanded legal protection available to said entities (Wołodkiewicz, Zembrzuski, 2021: 607). Furthermore, pursuant to the amended Law of March 9th 2023, consumer rights have been expanded to include the option of taking action also before a court of law competent for the consumer's place of residence.[9] Newly introduced to the Civil Procedure Code, the solution has been designed to facilitate the process of exercising the consumers' right to fair trial, while reducing the cost of proceedings potentially arising from cases being examined by courts located far away from the consumer's place of residence[10]. It may well be assumed that the aforesaid solution will become permanent, a part of the rich evolvement of court locality-related Polish legislation (Markiewicz, 2009: 248). Regardless of the above, courts of law should be expected to become aware of related duties, including *ex officio* case examination and contestation of judicial competence (Zembrzuski, 2018: 223).

The obligation requiring businesses to produce all pleadings, i.e. allegations and evidence (Article 458^{15} §1 of the Civil Procedure Code),[11] in action brought against consumers is new in nature. Should the business be the acting defendant, the aforesaid obligation shall be exercised in response to the suit.[12] Any allegations and/or evidence produced at a later stage shall be disregarded, unless

7 Pursuant to Article 27 of the Civil Procedure Code, the plaintiff shall bring action before the court of first instance in the district of the defendant's place of residence or place of business.

8 Pursuant to Article 31 §2 of the Civil Procedure Code, regulations regarding alternate jurisdiction shall not be applicable in cases against consumers.

9 Not applicable in cases of court jurisdiction exclusivity (Article 38 *et seq.* of the Civil Procedure Code).

10 The justification references solutions contained in Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12th 2012 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters (Article 18 clause 1).

11 Any business person not represented by a professional proxy (barrister or legal advisor) shall be duly informed of the obligation imposed upon him/her, and of the consequences of non-compliance.

12 Within a term set out by the chairperson, no shorter than one week, with an option of another term being set out, circumstances of the case pending (Article 458^{15} §3 of the Civil Procedure Code).

the business makes it plausible that the same could not have been produced, or that the need to do so arose at a later stage. Should the said entity succeed in delivering under the obligation as described, any further allegations and/or corroborating evidence shall be produced no later than within a term of two weeks as of the day of reference becoming feasible or required. The preclusion has been introduced with a view to secure more effective collection of procedural evidence. In aforesaid terms, the first stage of proceedings shall not be considered *"wasted"* (Zembrzuski, 2021: 64).

While the aforesaid solution improves procedural expedience, making it easier for consumers to take part in judicial proceedings, it makes the Polish system of procedural substance concentration in civil law proceedings (Gajda-Roszczynialska, 2020: 68; Zembrzuski, 2021: 47), intricate as it is and now based on the preclusion model, even more complex (Fierich, 1928: 1; Wengerek, 1958: 42; Weitz, 2009: 75; Weitz, 2011: 16). Restrictions resembling mechanisms applied in commercial proceedings have been introduced (Szczurowski, 2021: 71; Kulski, 2019: 1166); notwithstanding the above, restrictive solutions shall only apply to one of the parties to proceedings (the business entity), with regard to whom the moment of preclusion shall tie in with that of submitting the first pleading. Conversely, general rules and mechanisms shall apply to the consumer; in consequence, depending on the course of proceedings, the moment of preclusion in the consumer's case can tie in with the moment of drafting or approving the trial schedule, submitting a pre-trial document, or closing the trial. The new procedural mechanism will to a certain extent seemingly balance out the consumer's unequal playing field, while not resulting in unjustified improvements to his/her position.

Last but not least, noteworthy solutions include measures tying in with cost of proceedings, designed to encourage business entities to participate in conciliatory consumer dispute resolution attempts prior to any action being brought before a court of law. The legislator is critical of any circumstances of a business entity abandoning attempts at conciliatory dispute resolution prior to filing a suit, evading participation in such conciliatory efforts, and/or participating therein in bad faith. All of the above may contribute to pointless legal action, or have detrimental effect on the subject of the dispute being identified before a court of law. In such cases, notwithstanding the outcome of the case,[13] the court may order the business entity to cover the cost of legal proceedings in full or in part. In justified cases, the court shall be authorised to go as far as to increase the cost of legal proceedings, albeit doubling the cost shall be considered the cap

13 As a general rule, the unsuccessful party shall be obliged to reimburse the other party on demand for any costs required to seek due rights and targeted defence (Article 98 §1 of the Civil Procedure Code).

limit (Jakubecki, 2019: 187; Zembrzuski, Nadużycie 2022: 170). The aforesaid solution has been designed to *"promote good practices in business-consumer (B2C) relationships, and eliminate circumstances of untrustworthy businesses forcing consumers to bring legal action before a court of law in seeking to exercise their due rights"*[14]. According to the proponents, the solution should curb negative and dishonest consumer-affecting market behaviours. Yet, the claim that the afore-described mechanism shall safeguard effective consumer rights protection seems somewhat doubtful. The structure seems to be an attempt at expanding procedural law to include an institution resembling *culpa in contrahendo*, a substantive law implement[15]. The regulation itself as well as its legal nature remain obscure; only once applied in practice can they actually be verified in terms of usefulness and purpose.

4. Closing Remarks

While consumer rights protection remains the domain of civil law, civil procedure should, in all actuality, comprise the recognised fundamental set of instruments in substantive law protection. In Poland, the assumption of seeking protection of contractual rights and other interests in cases involving consumers pursuant to rules identical to those applying to claim seeking by other entities has been renounced (Rejdak, 2010: 462). Procedural law has been expanded to include auxiliary pro-consumer solutions, the role and significance of the so-called consumer right to trial duly accentuated.

Developing new separate proceedings as an optimum solution triggers doubt. Separate proceedings may become a source of further complications of intra-systemic interconnections typical for civil law proceedings (Cieślak, 2013: 132). While the scope of new separate proceedings is not overtly expansive, it may well be assumed that appeals for the introduction of successive pro-consumer solutions to procedural law or elimination of applicable regulations will be voiced over the upcoming months or years. The question regarding the purposefulness of parallel separate provisions concerning cases involving consumers and labour law cases remains open, for example (May, 2022: 279). That question will form part of a broader discussion concerning the structure, form, and suitability of procedural law in Poland (Zedler, 2006: 309; Weitz, 2020: 28).

Court trial should be effective, ensuring the capacity for a correct ruling to be passed in possibly swift proceedings (Ereciński, Weitz, 2005: 17). It should also be fair (Pietrzkowski, 2005: 53), ensuring that the rights of all parties involved

14 See: Justification, p. 42.

15 Pursuant to Article 72 §2 of the Code of Civil Procedure Law of April 23rd 1964 (uniform text: *Journal of Laws* 2022, item 1360, as amended.).

are duly safeguarded[16] (Zembrzuski, 2017: 573). The procedural position of parties to proceedings is occasionally considerably diverse for a variety of reasons (Borucka-Arctowa, 1978: 53). Significant factors may include i.a. professional or personal qualifications (including intelligence, life experience, and/or financial standing). Actual economic disproportions most often exist between the consumer and the opposing business entity. The Polish legislator having taken new action in 2003 to devise new separate proceedings is a manifestation of the equalising justice principle having been realised. Introducing statutory disproportion between parties to judicial proceedings was an intentional exercise. Legislative actions are to serve the purpose of "*fortifying the consumer's position*"[17]. Time will show just how efficient and effective they are. Legal practice will show whether they shall contribute to boosting a sense of justice in the society, and restore true equilibrium to parties engaging in civil law transactions.

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16 Depriving a party of the capacity to defend its rights ties in with the realisation of grounds for nullity of proceedings, the establishment of which gives rise to judicial obligation to annul the defective decision..

17 See: Justification, p. 41.

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РАЗВОЈ ПРАВНЕ ЗАШТИТЕ ПОТРОШАЧА У ПОЉСКИМ СУДСКИМ ПОСТУПЦИМА: НОВИ ОДВОЈЕНИ ПОСТУПЦИ

Резиме

Сврха закона о потрошачима је да структуира поштене и пристојне односе између потрошача и привредних субјеката. Потрошачки спорови су од значаја за читаву заједницу. С обзиром да је право Европске уније део домаћег правног поретка, оно се мора узети у обзир приликом пресуђивања у грађанскоправним предметима у Пољској. Будући да произилази (између осталог) из обавезе транспозиције права ЕУ, динамичан развој права потрошача у Пољској првенствено је повезан са материјалним грађанским правом, док је дискурс у погледу грађанскоправних поступака увек остао у сенци анализе инструмената материјалног грађанског права који се примењују у заштити потрошача. У погледу заштите права потрошача, пољски Законик о грађанском поступку не нуди много решења за регулисање потрошачких спорова која би се по било чему разликовала од других грађанскоправних спорова.

Без обзира на напредак европских интеграција, процес дефинисања и разграничења надлежности расподељених између законодавства ЕУ и домаћег законодавства у погледу процесног права изазива повремене контроверзе или сумње. Треба похвалити чињеницу да је Пољска недавно предузела законодавне мере које потрошачима олакшавају да остваре своја права у судским поступцима. Ове мере обухватају увођење узастопних одвојених поступака; (у Пољској су последњих година враћени одвојени поступци у привредним предметима, док су уведени нови поступци у предметима који се односе на интелектуалну својину). Док тренд умножавања одвојених поступака забрињава (јер доприноси усложњавању декларативног поступка и носи претњу од настајања и нагомилавања системских недоследности), појам развоја свеобухватних процедуралних решења намењених решавању потрошачких спорова и јачању процесне позиције потрошача (као тзв. слабије стране у поступку) чини се вредним пажње.

Допуњене одредбе Законика о парничном поступку (чланови 45814 – 45816) регулишу поступке који се односе на потрошаче. Нови процесни механизми укључују решења која унапређују постојеће механизме и доносе нова процесна

решења. Првопоменута група обухвата решења које се односе на суд месне надлежности. У принципу, потрошач стиче способност да поднесе тужбу и пред судом који је надлежан за његово или њено место пребивалишта. Нова процедурална решења обухватају обавезу привредних субјеката да наведу све тврдње и доказе у тужби против потрошача под претњом одбацивања. Иако ово решење олакшава учешће потрошача у судским поступцима, оно додатно компликује ионако замршени систем прикупљања процесних доказа у грађански поступцима заснованом на преклузији. С друге стране, решења која се односе на трошкове судских спорова су за похвалу јер охрабрују привредне субјекте да приступе добровољном решавању потрошачких спорова пре покретања тужбе пред судом. Између привредног субјекта и потрошача обично постоји реална економска диспропорција. Мере које је донео пољски законодавац усмерене су ка остваривању принципа једнакости, а време ће показати њихову ефикасност у судским поступцима.

***Кључне речи**: потрошач, заштита права потрошача, грађанско право, парнични поступак.*