

Infringement of consumers' collective interest – the case of “insurance–deposits”

Marcin Andrzej SŁOWIKOWSKI
Wrocław University of Economics, Poland

Abstract:

Aim: The purpose of the paper is to present the legal regulation aimed at protecting consumers and demonstrate how legal norms influences the economy. The topic is important because of the increasing scale of controversial practices concerning the insurance-depots.

Design / Research methods: This issue is examined using the review of legal acts and judgments regarding collective violations of consumer interests related to life insurance with a capital fund offered on the Polish market, as well as literature review.

Conclusions / findings: The aim of the paper is to assess the scope of negative consequences of such financial products. The paper is another voice in the discussion on loses from “insurance-depots” and might bring value added to their stakeholders, in particular banks and former clients.

Originality / value of the article: The research applies suggestion for further quantitative models concerning the topic.

Keywords: life insurance with a capital fund, consumer law, infringement of the consumers' collective interests.
JEL: K23

1. Introduction

Consumers, producers and the state are the basic stakeholders in the market economy. Consumers are the final link in the economic process chain, final recipients of goods and services produced. At the same time, a consumer's position on the market is weaker in comparison to that of producer. The aim of this paper is to present legal solutions aimed at consumer protection and demonstrate the functioning of legal norms in the economy using the example of an infringement of consumers' collective interest related to the so-called "insurance-deposits".

2. Consumer protection in the Polish law

The Office of Competition and Consumer Protection (UOKiK) is responsible for tasks in the field of consumer protection. The President of this office is a central government administration body and responds to the President of the Council of Ministers directly. The President of UOKiK is responsible for the anti-monopoly policy, comprising:

- a) anti-monopoly proceedings,
- b) concentration control.

Duties of this body in the field of consumer protection include:

- conducting proceedings on the infringement of consumers' collective interests,
- control of form agreements,
- supervision of product safety,
- monitoring of the market supervision system,
- managing the system of liquid fuel monitoring and control (*Kompetencje Prezesa UOKiK*).

Since Poland's accession to the European Union, the President of UOKiK has been also in charge of issuing opinions on proposals of public aid for entrepreneurs.

The key legislative act aimed at the protection of consumers is the Act of February 16, 2007 on Competition and Consumer Protection (consolidated text: Dz.U. [Journal of Laws] of 2017, item 229) which introduces direct protection of entrepreneurs by way of norms governing the development of competition and preventing restrictions to it. Measures undertaken on the grounds of this act are solely related to public interest. One of the reasons for the development of

competition and consumer protection was Poland's accession to the EU and the need to implement EU requirements to the Polish law.

Section IV of the Competition and Consumer Protection Act involves the ban on practices infringing consumers' collective interests. This term is defined as entrepreneur's illegal action detrimental to consumers' interests. The rationale behind the ban is to control actions entrepreneurs take with respect to consumers. These actions include all anti-consumer practices, even if not classified as monopoly practices (judgement of the Supreme Court of April 10, 2008, file ref. no. III SK 27/07). Pursuant to Article 24 (3) of the Act, consumers' collective interests are not construed as the sum of individual consumers' interests. In the judgement of April 10, 2008 already referred to above, the Supreme Court found that the infringement of consumers' collective interest may take place even if entrepreneurs' illegal actions were aimed at a limited group of consumers, as opposed to all consumers in general. This view was supported by the fact that hardly ever entrepreneurs do target their actions at all consumers, typically selecting only one specific consumer group. In this judgement the Court interprets Article 24(3) and defines a practice infringing consumers' collective interest as “entrepreneur's conduct which is undertaken in circumstances that suggest its repeatability with respect to individual consumers belonging to a group at which the entrepreneur targets their behaviour in such a way so that every consumer being the entrepreneur's client or prospect may fall victim to the behaviour”.

Article 24(1) of the Act lists entrepreneur's practices which infringe consumers' interests. They include:

- a) the use of form agreements containing provisions entered into the register of abusive clauses;
- b) breach of the obligation to provide consumers with reliable, complete and true information;
- c) unfair market practices or unfair competition practices.

To declare the infringement of Article 24(1), the following three conditions must be met:

- entrepreneur's conduct: the Competition and Consumer Protection Act assumes the definition of the entrepreneur laid down in Article 4(1) of the Act of July 2, 2004 on the Freedom of Economic Activity (consolidated text: Dz.U. [Journal of Laws] of 2016, item 1829 as amended), pursuant to which an entrepreneur is a natural person, legal person or an organisational unit without legal personality which has been granted legal capacity by a separate act – conducting economic activity in its own name. Meanwhile, pursuant to Article 2 of the Act, economic activity is any for-profit activity in the field of production, construction, trade, services, as well

as exploration, identification and extraction of fossils and any professional activity performed in an organised and continuous way;

- illegal nature of entrepreneur's conduct: involves conduct which is in breach of the binding laws, rules of community life or principles of morality. It may manifest itself in entrepreneur's actions or omissions. Principles of morality are broadly construed as respect for others. It should be manifested in providing consumer with correct information on their rights, duties and any risks. In view of the fact that the entrepreneur enjoys the position of a professional with much more expertise than the consumer, the entrepreneur should not aim at disorienting, misleading or taking advantage of consumer's lack of knowledge (Sylwestrzak 2012: 49);
- infringement of consumers' collective interest – this term is construed as the use of unfair market practices by the entrepreneur. Unfair market practices are defined in Article 4(1) of the Act of August 23, 2007 on Preventing Unfair Market Practices (Dz.U. [Journal of Laws] of 2007, No. 171, item 1206 as amended). If an entrepreneur's conduct violates principles of morality, misleads the consumers or distorts his or her market behaviour, it should be classified as an unfair market practice (Stawicki, Stawicki 2010: 527 ff.).

One of the competences of the President of UOKiK is related to this ban. An entrepreneur's illegal conduct triggers a procedure concerning the infringement of the consumers' collective interests carried out by the President of UOKiK. The procedure may end with a decision declaring the entrepreneur's actions infringements of consumer interest and ordering the entrepreneur to discontinue such practices. The decision would not be issued if the entrepreneur discontinued illegal practices on their own (Article 27(1)). Penalty for the infringement of consumers' collective interest is capped at 10% of the turnover generated in the financial year preceding the year in which the penalty is imposed. Moreover, additional interest may be charged if the entrepreneur does not comply with its obligation. The interest amounts up to EUR 10,000 per each day of delay.

3. Decision on life insurance plan with a capital fund (“deposit–insurance”)

Year after year, the President of UOKiK has been issuing a number of decisions on the infringement of consumers' collective interest. One example of actions aimed at eliminating entrepreneurs' illegal activities are decisions concerning life insurance plans with a capital fund,

commonly referred to as “deposit–insurance”. This part of the article focuses on legal provisions aimed at consumer protection in the context of deposit–insurance and relevant actions taken by the President of UOKiK.

However, I would like to start this discussion by presenting the nature of life insurance plans with a capital fund. The offer available on financial markets is being constantly developed and new, increasingly complex options for investing one’s cash surpluses are being added. All of them aim at attracting prospective clients. One of formerly popular solutions were deposits with daily accrued interest, allowing clients to evade the capital gains tax and thereby boost profits. However, the legislator, aware of the diminished tax revenue, eliminated this loophole by amending the Tax Ordinance Act (Matyszewska 2012). Therefore, investment insurance policies were created in response to the demand for solutions allowing clients to evade the so-called Belka tax (tax on capital gains in the form of interest on deposits). Life insurance plans with a capital fund are nothing else than a combination of a bank deposit account with an insurance policy. However, the importance of insurance in the product is insignificant and most of the funds are invested. After the expiry of the agreement, the funds are returned to the client. Because of insurance, the gains are not taxable.

Typically, such products are offered for a period of at least 6 months and require that clients contribute more cash as compared to traditional deposits. The agreement is not signed with the bank, as in the case of typical deposits, but with an insurance company, while the bank is only selling the product. It is important to bear in mind that the funds are not covered by the Bank Guarantee Fund, but by the Insurance Guarantee Fund, and if the insurer goes bankrupt a smaller portion of funds invested will be returned.

Unfortunately, some institutions offering insurance–deposits acted to the detriment of their clients. This is why the President of UOKiK has already issued the decision on this matter. The complaints submitted to UOKiK pertained, among other things, to the provision of unreliable information by institutions offering such products. Consumers were not informed of the potential risk that the value of funds paid in would decrease or about very high fees applicable on termination, amounting even to as much as 100% of money paid (decision of the President of UOKiK of October 15, 2014, file ref. no. RBG 30/2014). Sellers marketed their products as typical, safe deposits, even though the product had little in common with a typical deposit as such. As a

result, consumers signed contracts which were performed in a different way than consumers assumed.

Institutions against which administrative decisions were issued include:

- Aegon TU na Życie: the President of UOKiK punished the insurance company with a PLN 23.4m fine for misleading the clients by unilateral amendment to the contract during the contract duration;
- Idea Bank: a fine of PLN 4.1m for failure to provide information on risk inherent to the product and high costs of termination was imposed;
- Open Financel: the President of UOKiK punished the company with a PLN 1.7m fine for similar practices as in the case of Idea Bank;
- Raiffeisen Bank Polska: the President of UOKiK punished the company with a fine of PLN 21.1m for failure to provide all the required documents, failure to comply with terminations effected remotely and concealing the true nature of the offered product (*Polisolokaty – działania UOKiK*).

The sum of the fines imposed on the institutions listed above exceeded PLN 50m. The decisions were issued on the grounds of more than 600 complaints received from consumers and institutions, including the Insurance Ombudsman. Importantly, the President of UOKiK acts to the benefit of consumers, but does not provide them with any direct assistance in their individual disputes. For this purpose district consumer ombudsmen were appointed (in cities with district rights, municipal ombudsmen are available). In the context of insurance deposits, mounting complaints spurred actions aimed at the protection of all consumers in general. Despite the lack of the President's direct assistance for individuals, the decisions issued are very favourable to consumers, especially those willing to pursue their claims in courts. The decisions prove that the infringement of consumer rights were not single individual instances, but concerned an entire group of consumers. In consequence, they should make it easier for clients to recover their funds in a civil procedure. However, one must bear in mind that victims may be numerous, given high popularity of this product in the past. In 2014, the value of sold life insurance plans with a capital fund exceeded PLN 50m (*UOKiK: polisolokat może być na 50 mld zł*).

Currently, the victims of the insurance–deposit offer pursue their rights before common courts. One of such cases ended with a judgement issued by the Regional Court in Warsaw on March 27, 2015 (file ref. no. III C 1453/13). A victim in that case claimed the amount of nearly

PLN K572 from an institution that sold him a life and endowment insurance with a capital fund. The purpose of the product was to increase the value of funds invested in the capital fund. After two years of contributing to the capital fund, of PLN K573 collected on the account only PLN K313 was left, and the termination fee of PLN K250 was charged. The Court found the agreements on the basis of which the products were offered invalid, and declared the company's conduct misleading and consequently generating client's loss. The Court declared the construction of the product purposeful and aimed at securing profit for the seller. As demonstrated by this case, it is possible to pursue claims in such instances. At the same time, the case draws our attention to entrepreneurs' illegal activity targeted at maximizing profits.

The growing number of consumer complaints concerning insurance–deposits and the information in media propelled the amendment to the Competition and Consumer Protection Act, which was adopted on 5 August 2015. Amendments aim at improving consumer protection and strengthening the position of the President of UOKiK. The most important ones include:

- ban on providing consumers with offers of services which are inappropriate in the context of their needs and on offering the acquisition of such services in a manner inappropriate for their nature;
- interim decisions aimed at ensuring expedient response to any threat to consumers' collective interest; such a decision, issued when proceedings are still underway, will bind the entrepreneur to discontinue the activity which is suspected to be illegal;
- introduction of a “mystery client” procedure, to be used at court's consent to collect evidence. This solution aims at collecting and verifying information in cases regarding misleading clients, such as in the case of insurance–deposits under discussion. A mystery shopping procedure cannot be used as a provocation;
- the option to submit an opinion of significance in a case: if supported by public interest, UOKiK will be able to present its opinion before a common court. Without a doubt, this will improve the quality of court proceedings thanks to the contribution of the President's experience and expertise regarding legality of entrepreneurs' conduct (*Parlament przyjął nowelizację ustawy o ochronie konkurencji i konsumentów*).

Changes introduced by the Act of August 5, 2015 amending the Competition and Consumer Protection Act and certain other acts (Dz.U. [Journal of Laws] of 2015, item 1634) come into force on April 17, 2016 (after a six months' *vacatio legis*). They should improve consumer protection,

especially when it comes to risky financial products. Previous drafts assumed strengthening the position of the President of UOKiK even further. The decisions issued by this body were to be binding for civil courts. As a result, the decisions would be prejudicial for the court concerned. However, the amendment was withdrawn, as it was considered to interfere too much into the system of justice. However, it is important to note that in its decision the Supreme Court found that the decisions of the President of UOKiK are of prejudicial nature (Supreme Court resolution of July 23, 2008, file ref. no. III CZP 52/08). However, this position applied only to the infringements of the freedom of competition and was of isolated nature.

4. Conclusion

The paper focuses on the issue of consumer protection by the Office of Competition and Consumer Protection in cases concerning so-called insurance–deposits. Using the example of life insurance plans with capital funds, the author emphasizes the necessity to ensure ongoing consumer protection in the environment where entrepreneurs resort to numerous tricks misleading consumers or abusing their lack of knowledge in order to attain their own goals. Although district (municipal) consumer ombudsmen and Insurance Ombudsman are available to support consumers in their individual struggles, further instruments ensuring consumer protection need to be introduced. This is the purpose of proceedings on the infringement of consumers' collective interests. In this context, amendments to the Competition and Consumer Protection Act of August 2015, effective since April 2016, should be viewed as a progress, since they streamline and improve the effectiveness of actions aimed at preventing entrepreneurs' illegal conduct.

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Naruszenie kolektywnego interesu konsumentów – przypadek „polisolokat”

Streszczenie

Cel: Celem artykułu jest prezentacja regulacji prawnych dotyczących ochrony konsumentów i demonstracji jak normy prawne wpływają na gospodarkę. Temat jest istotny z powodu rosnących kontrowersji dotyczących sprzedaży „polisolokat”.

Układ / metody badawcze: Temat jest badany przy pomocy analizy aktów prawnych, wyroków sądowych i literatury naukowej dotyczącej „polisolokat”

Wnioski / wyniki: Celem pracy jest dodanie kolejnego głosu do debaty o stratach z „polisolokat”, co może wnieść wartość dla ich posiadaczy i zainteresowanych stron

Oryginalność / wartość artykułu: Rezultaty mogą być wykorzystane do modeli ilościowych dotyczących analizowanego tematu.

Słowa kluczowe: ubezpieczenia na życie z funduszem kapitałowym, prawo konsumenckie, naruszenie zbiorowych interesów konsumentów.

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