

University of Economics in Katowice

Volume 16

2014

Journal of

**Economics &
Management**

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**CONSUMER PROTECTION
AS A PREMISE TO BUILD TRUST
IN THE FINANCIAL SERVICE MARKET**

Abstract

Consumers are very important participant of the financial market, generating high demand for its products and services. However, as non-professional clients, they require a special legal protection, securing their interests in contractual relations with financial institutions. The European Commission, as well as the national legislation of the Member States of the European Union seek to provide it for consumers, although it manages to varying degrees of success. The EU has no regulations, which for example might oblige member states to establish institutions of insured protection. Changes are also required when it comes to the protection of clients of failed investment companies, also in Poland, especially the amount of cover and the date of compensation payment. In Poland, there is a lack of a comprehensive law, aimed at the problem of inaccurate advertisement, misleading the customers. Conclusion of a fragmentary legislation in a number of different legal acts, certainly does not promote the elimination of unfair behavior of advertisers. Finally, there is too many ‘abusive clauses’ in contracts concluded with consumers, acting to their detriment.

The aim of the study is to present the key elements of the consumer protection system, combined with the indication of the EU and the Polish legal basis, regulating the related issues and arising in connection with system operations the dilemmas. The individual client's protection system includes: guarantee schemes protecting customers of failed financial institutions; activities to eliminate information asymmetry, manifested by an increase in information obligations of financial institutions for their clients; prohibition of the use in contracts concluded with consumers prohibited contractual provisions, called “abusive clauses” by the professional side of the transaction; non-judicial institutions which settles disputes between clients and financial institutions, protection of personal data.

The paper remains narrative and draws on the conceptual analysis of the current state of affairs supported by deduction and induction as core methodology.

Keywords: *consumer protection, guarantee schemes, information asymmetry, information obligations, abusive clauses, consumer arbitration, arbitration courts, personal data protection.*

JEL Classification: *G2, N2.*

Introduction

The consumers are an important, and in some EU countries the most important recipient of financial products and services. They are also considered unprofessional clients, as they tend to lack sufficient economic, financial and legal knowledge that would ensure equality between the client and the financial institution. Against this backdrop, consumer protection seems to be of great importance. Consumer trust in the financial service market guarantees sales and profit growth in this specific sector. Considering the above, the European Commission has been undertaking numerous actions aiming to reinforce the legal protection schemes for consumers at the single market for financial services for years (with varying degrees of success), which are subsequently adopted at a national level. The main objective is to develop an appropriate legal framework for the financial service market as well as supervisory and precautionary standards accompanied by a supervision system for their implementation. Apart from that, many other components of the customer protection system may be listed. The most important customer protection scheme elements are:

- guarantee schemes protecting customers of insolvent financial institutions,
- actions aiming to eliminate the information asymmetry, such as committing financial institutions to more information obligations towards their customers,
- ban on using unlawful contractual provisions, i.e. so called abusive clauses, by the professional party to the transaction,
- non-judicial institutions settling disputes between the customers and financial institutions,
- personal data protection.

This article has a review character. Its aim is to systematize the issues related to the current scope of the individual client's protection, on the European Union and the Polish financial services market, and at the same time indicate accompanying – to discussed issues – fundamental dilemmas. In the article there were confronted the records of applicable legal regulations in the field of consumer protection, arising from EU directives and Polish laws in this area. Using synthesis, deriving from the analysis of a number of legal acts, elements of available knowledge about the consumer protection on financial services market, were combined into a cohesive whole, recognizing their interrelations. It also provides the author's own thoughts on the topic, resulting from the collected material.

Writing the article there was used the inductive approach. Collecting information about the real customer protection of bank and the scope of the work, aimed at its further increase, there was made an appropriate generalizations re-

garding the discussed issue. By deduction, it was adopted a fundamental principle of banks' cooperation with non-professional customers, which is the need to protect their rights, which rightness was considered as unqualified, developing on it further, more detailed inference, based on the logic principles, about the rules of creating customer's confidence to the financial services market.

1. Guarantee institutions and their role in defending the interest of customers of insolvent financial institutions

Issues related to interest protection of clients of insolvent credit institutions are governed within the EU by the Directive on deposit-guarantee schemes¹ of 1994, substantially amended during the economic crisis by Directive no. 2009/14/EC². Changes imposed by the ongoing XXI century crisis, strongly affecting the banking sector and undermining the depositors' confidence, included a mandatory increase in the guarantee limit from 20,000 EUR to 50,000 EUR, with a recommendation of its further increase to 100,000 EUR (at the sole discretion of each Member State). The option of a 10% depositor's own contribution has also been repealed. Finally, the repayment period for guarantee sums has been shortened to 20 business days as of the day the bank is declared insolvent or a judicial authority suspends the depositors' ability to make claims against it. In duly justified cases, this period may be extended by another 10 days. The currently proposed, another change in the discussed directive provides the gradual shortening of the term of guarantee payments: up to five days in the case of advance payments, in 10 years – the time of other payments will be shortened – to seven days or, in the second variant, seven days after the beginning of validity of the new regulation. Therefore, the proposed solutions will increase the consumer protection.

The Directive imposes on national guarantee schemes an obligation of protecting depositors of branches created in other Member States³, such branches being entitled to complement their guarantee schemes within the local system of the host country at their own discretion. Branches of banks from non-EU coun-

¹ Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, Official Journal L 135.

² Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay, Official Journal L 68/3.

³ Por. A. Pawlikowski, *Polski system gwarantowania depozytów na tle rozwiązań zastosowanych w innych państwach UE*, „Materiały i Studia” 2005, nr 6, s. 16.

tries are obliged to join the host country guarantee scheme if their domestic one offers guarantees at a lower level.

The schemes for compensation payment to investors are governed by EU Directive 97/9/EC⁴. It has not, however, managed to satisfy the expectations with regards to the level of coverage of investor loss resulting from an investment firm insolvency, neither with regards to shortening the waiting time for the compensation payment. The protection limit still amounts to only 20,000 EUR; furthermore, the Member States may decide that the customer should cover 10% of the loss within the compensation. The compensation payment term also leaves a lot to be desired although it has been established as 3 months, but starting from the date the eligibility and amount of the claims are ascertained, not from the date the institution is declared insolvent, which extends it to even a couple of years. Considering that, the European Commission requested an amendment of this Directive in July 2010, aiming to increase the limit to 50,000 EUR, abolish co-insurance and introduce preliminary payments amounting to 1/3 of the compensation to injured investors⁵,

It is objectionable that the EU has not developed any regulations whatsoever which would oblige the Member States to create institutions protecting people insured in insolvent insurance companies although the position of insurance products in consumers' lives has gained importance.

In Poland, protection schemes have been implemented for all customers and investors of licensed financial institutions, i.e. customers owning deposits in banks and credit unions (SKOK), assets in investment companies and policies of insolvent insurance companies. Respective regulations have been included in the Act on the Bank Guarantee Fund⁶, the Act on trade in financial instruments⁷ and the Act on mandatory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau⁸.

⁴ Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes, Official Journal L 084.

⁵ Rezolucja legislacyjna Parlamentu Europejskiego z dnia 5 lipca 2011 r. w sprawie wniosku dotyczącego dyrektywy Parlamentu Europejskiego i Rady zmieniającej dyrektywę Parlamentu Europejskiego i Rady 97/9/WE w sprawie systemów rekompensat dla inwestorów (COM(2010)0371 – C7-0174/2010 – 2010/0199(COD), Brussels, 12.7.2010, COM 2010 371 final, 2010/0199 (COD), Proposal for a Directive the European Parliament and of the Council amending Directive 97/9/EC of the European Parliament and of the Council on investor-compensation schemes, SEC(2010) 845, SEC(2010) 846.

⁶ Ustawa z dnia 14 grudnia 1994 r. o Bankowym Funduszu Gwarancyjnym, tj. Dz.U. 2009, Nr 84, poz. 711 ze zm.

⁷ Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi, Dz.U. 2005, Nr 183, poz. 1538 ze zm.

⁸ Ustawa z dnia 22 maja 2003 r. o ubezpieczeniach obowiązkowych, Ubezpieczeniowym Funduszu Gwarancyjnym i Polskim Biurze Ubezpieczycieli Komunikacyjnych, Dz.U. 2003, Nr 124, poz. 1152 ze zm.

Therefore, since 1995 there has been an institution guaranteeing repayment of the guaranteed sums of savings to bank customers should the bank running their accounts become insolvent. This institution is the Bank Guarantee Fund (BGF). Poland has adopted the amendments to the EU Directive increasing the responsibility of guarantee institutions towards the depositors, increased the compensation limit first to 50,000 EUR and afterwards to 100,000 EUR, and abolished co-insurance. Poland has also shortened the depositors' waiting time for the payments due from the BGF pursuant to the EU Directive. This was intended to prevent outflow of customer funds from the banking sector, although its condition is better compared to banks in other EU countries. Since June 2013, deposits kept by credit unions (SKOK) are also protected by the BGF, and no longer by the Credit Union Mutual Insurance Society. The amendments have been implemented pursuant to an amendment of the Act on Credit Unions⁹. The amendments aimed to enhance the level of security for the credit union customer savings (amounting to over 16 billion PLN at the end of the first quarter of 2013) as well as the stability and reliability of these financial entities. Previously, these credit unions were placed under supervision of the Polish Financial Supervision Authority (PFSA) for the same purpose. They were also ordered to keep financial reserves at the National Bank of Poland.

The protection, however, applies exclusively to customers of licensed credit institutions. However, in Poland, just like in the entire EU, a lot of entities act outside the banking system (shadow banking), not subject to bank regulations or similar, outside the PFSA supervision, they are not members of the BGF, although at the same time they receive funds in a way similar to receiving deposits, modify maturity dates and liquidity, transfer the credit risk and apply high financial leverages. Using their services is often connected with a significant risk of losing money for the consumers, who are often unaware of this fact, as demonstrated by many real-life examples. The problem has been noticed by the European Commission who published the Green Paper on Shadow Banking in 2012¹⁰. Adoption of appropriate regulations to this respect, if any, will take some time, but it seems already evident that the shadow banking cannot be regulated in a comprehensive manner.

In 2001, the Polish Compensation Scheme was launched, governed by the Central Securities Repository of Poland (CSRP), and became one of the many

⁹ Ustawa z dnia 19 kwietnia 2013 r. o zmianie ustawy o spółdzielczych kasach oszczędnościowo-kredytowych oraz niektórych innych ustaw, Dz.U. 2013, poz. 613.

¹⁰ European Commission Brussels, on 19/03/2012 r. COM(2012) 102 final, http://ec.europa.eu/internal_market/bank/docs/shadow/green-paper_pl.pdf.

protection schemes for investors benefitting from the services of licensed investment companies (broker companies, banks conducting brokerage activity, custodians or investment funds). Its objective is to pay compensations due to investors based on their funds kept on money accounts run by an insolvent investment company and lost financial instruments. The Compensation Scheme repays the compensations up to the equivalent in PLN of 3,000 EUR in 100% of the funds under the compensation scheme and 90% of the surplus in excess of this amount, the maximum value of the funds under the scheme amounting to only 22,100 EUR, which obviously requires prompt amendments. In the case of investment companies, the present customer protection schemes cannot be compared to those offered to customers of banks and credit unions. The CSRP prepared draft amendments including a proposition to increase the sum covered to 50,000 EUR, more importance for the preventive function, and focusing the protection on non-professional investors¹¹.

In turn, the Insurance Guarantee Fund (IGF) indemnifies customers of insolvent insurance companies under mandatory third-party liability policies for motor vehicle owners, agricultural third-party liability policies and other kinds of mandatory insurance up to 100% of the indemnities and benefits due, and with regards to life insurance in an amount up to 50% of the liabilities, no more, however, than an equivalent of 30,000 EUR. Apart from the guarantee function, the IGF has also been playing a preventive role since 2004¹².

2. Fighting information asymmetry and enhancing consumer protection efficiency

An important aspect of customer protection is actions aiming to eliminate the information asymmetry, such as committing financial institutions to provide more information to their customers, so that they can become acquainted with the institution's activity, the financial products and services they offer, the rights and obligations of the parties to the agreement, the risk involved in the transaction as well as the financial results of their activity, and compare offerings of various competitors. They are intended to reduce the risk of customers making uninformed decisions. The financial sector has been dominated by banks; there-

¹¹ System Rekompensat. Podstawy prawne oraz zasady funkcjonowania Systemu Rekompensat w Polsce, <http://www.kdpw.pl/pl/KDPW/publikacje/Documents/publikacje/SystemRekompensat.pdf>.

¹² Fundusze gwarancyjne w wybranych krajach europejskich, „Biuletyn Ubezpieczeniowego Funduszu Gwarancyjnego” czerwiec 2006, s. 137-138.

fore their information obligations are particularly interesting for the consumers. The information obligations of banks result from a number of legal acts. Firstly, they are required by the third pillar of Basel II, specifically by the CRD Directive¹³ (soon to be replaced by the CRD IV Directive¹⁴), under which market players making economic decisions should receive information from the credit institution (in respect of quantity and quality) on the institution's scope of activity and the risk run by it, the management processes and capital adequacy. The MiFiD Directive is also worth mentioning here, as it requires financial and credit institutions to provide the customers with reliable information, not objectionable or misleading, including warnings about the risk involved in investing in financial instruments¹⁵.

In Poland, certain information which may shed light on the bank's standing, the scale of the risk run by the bank, its products, their availability conditions, i.e. information on the bank's activity has to be disclosed under the Banking Law¹⁶. Pursuant to this Act, the banks are obliged to make the following information available to their customers:

- the bank's balance sheet accompanied by an auditor's opinion,
- the composition of the management board and supervisory board authorised to incur liabilities on behalf of the bank,
- the bank operation area and the associating bank (in case of cooperative banks),
- interest rates, charge and commission rates, exchange rates, interest capitalisation periods,
- payment terms¹⁷.

Apart from the Banking Law, the information obligations of banks are also referred to in: the Act on access to public information, the Act on employee information and consultation, the PFSA Resolution No. 385/2008 on detailed rules

¹³ CRD: Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (amended by: Directive 2009/83/EC; Directive 2009/111/EC; Directive 2010/76/EU); Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (amended by: Directive 2009/27/EC; Directive 2009/111/EC; Directive 2010/76/EU).

¹⁴ CRD IV: Capital Requirements Directive – CRD / Capital Requirements Regulation – CRR (adopted by the European Parliament, pending approval of the Council of the EU). Implement the provisions of Basel III on the level of EU legislation.

¹⁵ MiFiD: Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, Official Journal L 145

¹⁶ Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe, tj. Dz.U. 2012, poz. 1376 ze zm.

¹⁷ D. Klucz, Obowiązek informacyjny banków, http://www.portalbs.pl/index.php?option=com_content&task=view&id=134&Itemid=59.

on and the manner of announcing quantity and quality information by banks regarding their capital adequacy and on the scope of information subject to announcement, and the Rules on Good Practice in Banking. Information policies of banks (and other financial institutions) are also influenced by: the Act on trade in financial instruments, the Act on public offering and conditions of introducing financial instruments to the organized trade system and on public companies as well as the Minister of Finance Regulation on current and periodic information to be communicated by security issuers and conditions on recognising as equivalent of information required under the laws of a non-Member State¹⁸.

The information obligations also apply to non-banking financial institutions such as broker companies. Since 2011, they are also obliged to publish information (reports) on risk management and capital adequacy. The respective information should enable the customer to carry out additional assessment, considering the capital adequacy and risk management quality. Based on this information, the customers should be able to check the components of the broker company supervised capital, the capital requirements for coverage of a particular risk, or additional risks identified in the environment of the assessed entity.

Information obligations of investment funds result mainly from the Act on investment funds. Pursuant to its provisions, open investment funds and specialized open investment funds are liable to publish information prospectuses on their websites, key information for investors, annual and half-year financial statements (including joint financial statements of funds and sub-funds as well as statements of individual sub-funds). Closed public investment funds communicate a prospectus or an information memorandum to the public or to interested investors as set out in the Act on public offering. Non-public investment funds have to communicate annual and half-yearly financial statements upon the request of a participant, promptly upon their examination or review by an auditor¹⁹.

¹⁸ Ustawa z dnia 6 września 2001 r. o dostępie do informacji publicznej, Dz.U. Nr 112, poz. 1198, ze zm.; Ustawa z dnia 7 kwietnia 2006 r. o informowaniu pracowników i przeprowadzaniu z nimi konsultacji, Dz.U. Nr 79 poz. 550, ze zm.; Uchwała nr 385/2008 Komisji Nadzoru Finansowego z dnia 17 grudnia 2008 r. w sprawie szczegółowych zasad oraz sposobu ogłaszania przez banki informacji o charakterze jakościowym i ilościowym dotyczących adekwatności kapitałowej oraz zakresu informacji podlegających ogłaszaniu, Dz.Urz. KNF Nr 8, poz. 39, ze zm.; Zasady Dobrej Praktyki Bankowej przyjęte przez Związek Banków Polskich; Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi, Dz. U. 2010, Nr 211, poz. 1384, ze zm.; Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych, Dz.U. 2009, Nr 185, poz. 1439 ze zm.; Rozporządzenie Ministra Finansów z dnia 19 lutego 2009 r. w sprawie informacji bieżących i okresowych przekazywanych przez emitentów papierów wartościowych oraz warunków uznawania za równoważne informacji wymaganych przepisami prawa państwa niebędącego państwem członkowskim, Dz.U. Nr 33, poz. 259, ze zm.

¹⁹ Ustawa z dnia 27 maja 2004 r. o funduszach inwestycyjnych, Dz.U. 2004, Nr 146, poz. 1546 ze zm.

The Act on Mandatory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau sets out the rules for information obligations of insurers. An important amendment to this Act came into effect on 11 February 2012 imposing a new specific information duty on the insurer related to the so-called prolongation clause, obliging the insurance company to send the insurer information on the insurance for the subsequent insurance period. This applies to third-party liability policies for motor vehicle owners, third-party liability policies for farmers with respect to their agricultural holding ownership and insurance for agricultural buildings within the holding against fire and other casualties.

Payment service providers are also obliged to provide information. This results from Directive 2007/64/EC²⁰ integrated into the Polish law by the Act on payment services²¹. The information minimum the service provider has to make available to the customers and facilitate access to it, e.g. by publishing them on the website (although the initiative to obtain this information is on the part of the user) in case of single payment transactions consists of:

- information on the data required to perform a payment order,
- information on the time necessary for the service performance,
- information on payments and exchange rates.

In the case of smaller payments (not exceeding 30 EUR or when the limit of expenses does not exceed 150 EUR), the information obligations are also rather limited. In this case, the payment institution should only provide the payer with information on the main characteristics of the payment service and basic information necessary to make the decision.

In the case of framework agreements (which regulate individual transaction performance), more detailed information should be communicated. The information has to be provided to the customer (and not just made available), i.e. communicated in writing or, upon the express request of the customer, via email. The information in this case should include:

- the provider's data and the competent supervisory bodies,
- rules on using the payment service,
- charges, interest rates, exchange rates,
- contact information,
- a description of protective and corrective measures,
- rules on amendments to and termination of the framework agreement,

²⁰ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, Official Journal L 319/1.

²¹ Ustawa z dnia 19 sierpnia 2011 r. o usługach płatniczych, Dz.U. 2011, Nr 199, poz. 1175 ze zm.

- dispute settling procedures²².

It is vital for consumer protection that the information is clear and comprehensible, as also results from Art. 385 of the Code of Civil Procedure²³. Any failure to fulfil the information obligations shall be penalised with civil, administrative and legal sanctions as anticipated under the Act on payment services.

Regulations on consumer credits are an important part of consumer protection schemes with regards to the right to information. On the EU level, they are required under Directive 2008/48/EC on credit agreements for consumers²⁴. In Poland, they are regulated by the Consumer Credit Act²⁵. "Consumer credits" are understood as, apart from bank credits, products such as: loan agreement, agreement on deferment of cash payment by the consumer as long as the consumer is liable to incur any costs related to such a deferment, a credit agreement where the creditor incurs liabilities towards third parties, and the consumer undertakes to return the payment to the creditor or an revolving loan agreement. The EU Directive defines consumer credit as a liability in an amount between 200 and 75,000 EUR. In Poland such credits amount up to 255,550 PLN. Both the Directive and domestic regulations include provisions protecting the customer's interest. The consumer has the right to withdraw from a credit agreement with no justification required within 14 calendar days as of its conclusion. Furthermore, the creditor is liable to calculate and inform the consumer of the actual credit interest rate and the total costs of the credit, or otherwise the customer shall be released from incurring such costs. The borrower should also receive a harmonised form (standard European information sheet, forming also an attachment to the Polish act) with detailed terms and costs of the credit before the credit agreement is signed.

Of course, this list of obligations is not exhaustive, nor is the catalogue of financial institutions it applies to. The above considerations, however, demonstrate that the legislator tried to resolve this problem in a comprehensive manner and with an understanding of its importance, although much remains to be done to this respect. In fact, the way the information is communicated is not always clear and exhaustive, and as a result the Customers enter into agreements which are unfavourable for them, not always trying to execute their indemnity rights. This results mainly from lack of awareness of consumers' rights. Nevertheless, even when dealing with financial institutions a maximum degree of caution is

²² M. Chrzan, Obowiązki informacyjne dostawcy usług płatniczych, „Monitor Prawa Bankowego” sierpień 2012.

²³ Ustawa z dnia 17 listopada 1964 r. Kodeks Postępowania Cywilnego, Dz.U. 1964, Nr 43, poz. 296.

²⁴ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, Official Journal L 133/66.

²⁵ Ustawa z dnia 12 maja 2011r. o kredycie konsumenckim, Dz.U. 2011, Nr 126, poz. 715.

recommendable, especially if their services are offered on a distance marketing basis. The rules on their sales are governed by Directive 2002/65/EC²⁶. In Poland, distance marketing of financial services to consumers (eg. via Internet) is subject to the provisions of the Act on protection of certain consumer rights and responsibility for damages caused by a hazardous product²⁷. Also in this case, the financial institutions have been obliged to inform the customer of the offering, to a greater extent than in case of remote agreements, such as for instance to provide information on the seller, characteristics of the service (eg. prices), the right to withdraw from the agreement (14 days as of concluding the agreement), mode of filing complaints, the risk connected with the particular instrument and the term of the agreement. The financial institution marketing a service or a product has to provide the customer with a confirmation of the agreement terms and conditions in advance (in writing, on a CD, etc.).

3. Abusive clauses, customer protection against unfair market practice, and personal data protection

A frequent issue related to consumer agreements is including unfair terms which cause damage to the customer (abusive clauses) in agreements. Customers are protected against this practice Europe-wide by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts²⁸. It considers unfair such contractual clauses which are not negotiable with the customer, contrary to good faith requirements, and cause inequality in the rights and obligations of the parties to the detriment of the service receiver, i.e. the consumer²⁹. An attachment to the above Directive features examples of detailed clauses illustrating such abusive situations. In Poland, a sample catalogue of 23 contractual clauses has been included in Art. 385 of the Civil Code³⁰. A prohibited clause catalogue, regularly updated based on valid court rulings of the Competition and Consumer Protection Court, is kept by the President of the Competition and Consumer Protection Office. This register is public and accessible for free. It includes at the moment

²⁶ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, Official Journal L 271.

²⁷ Ustawa z dnia 2 marca 2000 r. o ochronie niektórych praw konsumentów oraz o odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny, Dz.U. 2000, Nr 22, poz. 271, ze zm.

²⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal L095, ze zm.

²⁹ Council Directive 93/13/EEC of 5 April 1993 on unfair..., op. cit., art. 3, ust.1.

³⁰ Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dz.U. 1964, Nr 16, poz.93, ze zm.

(May 2013) 461 entries connected with financial and banking services, with as much as 366 of them related to the banking sector. Irregularities are most frequent in provisions regarding grounds for interest rate modification, terms of changes of the charges borne by the customer and the mode of introducing amendments to the commission amounts. Other examples are provisions which make it impossible to use the funds, lack of index adjustment of the insurance sum, excessive requirements regarding fund repayment, harmful for the client, or lack of responsibility on the part of the bank for the money operations they perform. A lot of irregularities have also been discovered in the shadow banking. In this case, a frequent practice is to deny a loan without reimbursing the upfront fee already paid by the client it and excessive costs of insurance investment product liquidation. 112 prohibited clauses have been discovered in the insurance sector³¹. It is worth noting that abusive clauses in agreements and regulations offered to the clients may result from lack of awareness and be included unintentionally, but usually they are introduced expressly in order for the financial institution to be the dominating party to the transaction. If it is proven that prohibited contractual clauses have been harmful for the consumers' collective interest, the institution applying such clauses may be punished with a financial penalty amounting up to 10% of its last financial year revenue³². Furthermore, an injured consumer may claim compensation from the institution which has caused those damages by applying prohibited clauses. National law should also ensure that unfair and prohibited clauses are not binding even if a financial institution includes them in an agreement concluded with an unaware client. In addition, EU Member States must develop effective measures to prevent the continued use of the clauses in question and provide the possibility of judicial and administrative disputes relating to the use of unauthorized entries. The courts deal with such cases *ex officio*, ruling pursuant to the Directive³³. According to the Court of Justice, the Directive allows introduction of regulations in national legislation stipulating that agreements with such unfair terms and conditions shall become invalid if it improves the level of consumer protection³⁴.

A reproachful practice of similar irregularities at the advertising level should also be pointed to, as advertisements often mislead the clients and competitors alt-

³¹ S. Żaryn, Rynek naznaczony pułapkami, <http://www.bankier.pl/wiadomosc/Rynek-naznaczony-pulapkami-2826076.html>.

³² P. Otto, Klauzule niedozwolone mogą firmę drogo kosztować, http://forsal.pl/grafika/714116,138400,klauzule_niedozwolone_moga_firme_sporo_kosztowac.html.

³³ A. Kunkiel-Kryńska, *Prawo konsumenckie UE – nieuczciwe klauzule w umowach konsumenci*, „Europejski Przegląd Sądowy” maj 2012, s. 54-57.

³⁴ <http://www.lex.pl/czytaj/-/artykul/ets-umowa-konsumencka-zawierajaca-nieuczciwa-klauzule-moze-byc-uznana-za-niewazna>.

though such practice is forbidden according to Directive 2006/114/EC³⁵. Poland lacks one comprehensive legal act dealing with this issue. Fragmentary provisions included in various legal acts make it more difficult to eliminate unfair practices of advertisers. Provisions regarding this kind of protection have been included, for example, in the Act on fighting unfair competition³⁶. In Poland, there are also many other regulations and institutions protecting the client from unfair market practices, such as: the Act of 2007 on fighting unfair market practice, the Code of Civil Procedure, the Act of 2003 on insurance and retirement pensions supervision and the Insurance Ombudsman, the Act of 2007 on competition and consumer protection, or the arbitration clause included in the Code of Civil Procedure³⁷. Regulations of arbitration courts and consumer arbitration should also be mentioned here. A possibility of non-judicial settlement of disputes between the consumer and financial institutions greatly improves the scope and quality of consumer protection. Unfortunately, the EU has not yet developed harmonised settlement authorities, therefore such authorities have different jurisdiction, competencies and procedures in each country³⁸. However, creation of consumer protection bodies strengthens the institutions in question in the eyes of the arbitration participants. Arbitration between clients and financial institutions also improves customer service quality, reinforcing an amicable attitude towards consumers in these institutions. Poland has achieved this objective by creating arbitration institutions (Table 1)³⁹, although their operation leaves room for improvement. The majority of customers continue to settle disputes in court, despite the higher costs and the long duration of proceedings.

³⁵ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, Official Journal of European Union L 376/21.

³⁶ Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji, tj. Dz.U. 2003, Nr 153, poz. 1503.

³⁷ Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym, Dz.U. 2007, Nr 171, poz. 1206; Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego..., op. cit.; Ustawa z dnia 22 maja 2003 r. o nadzorze ubezpieczeniowym i emerytalnym oraz Rzeczniku Ubezpieczonych, Dz.U. 2003, Nr 124, poz. 1153, ze zm.; Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów, Dz. U. Nr 50, poz. 331 i Nr 99, poz. 660, ze zm.; Ustawa z 17 listopada 1064 r. Kodeks postępowania cywilnego..., op. cit.

³⁸ D. Wojtczak, Repulsywne mechanizmy ochrony konsumenta usług bankowych – nowe perspektywy, „Prawo Bankowe” 2008 nr 4(128), s. 63, 69.

³⁹ More on them: www.zbp.pl; <http://www.skef.pl/wp-content/uploads/2012/08/Regulamin-SAK.pdf>; www.knf.gov.pl; Ustawa z dnia 22 maja 2003 r. o nadzorze ubezpieczeniowym..., op. cit.; Ustawa z dnia 16 lutego 2007 r. o ochronie..., op. cit.; E. Rutkowska, D. Wojtczak, *Alternatywne sposoby rozwiązywania sporów między bankiem a konsumentem usług bankowych*, „Prawo Bankowe” 2008, nr 7/8(131/132); I.D. Czechowska, *Ochrona konsumenta rynku usług bankowych* [in:] *Finanse 2009 – teoria i praktyka. Bankowość*, Zeszyty Naukowe, nr 548, Wydawnictwo Uniwersytetu Szczecińskiego, Szczecin 2009, s. 409, 410, 411; M. Penczar, *Ochrona konsumenta na integrującym się rynku bankowym w Unii Europejskiej*, „Bank i Kredyt” 2007, nr 7, s. 13-14; M. Capiga, W. Gradoń, G. Szustak, *Sieć bezpieczeństwa finansowego*, CeDeWu, Warszawa 2010, s. 94-98.

Table 1. Consumer arbitration and arbitration courts in Poland

Consumer arbitration
Bank Consumer Arbitration (BCA)
Cooperative Consumer Arbitration (CCA)
Arbitration Courts
PFSA Arbitration Court
Arbitration Court of the Polish Bank Association
Arbitration Court of the Society for Promotion of Financial Education
Online Dispute Resolution
Arbitration Court of the Insurance Ombudsman
Competition and Consumer Protection Court

Finally, let us consider another issue of great importance to all consumers, namely personal data protection, governed by Directive 95/46/EC⁴⁰, and the Personal Data Protection Act in Poland⁴¹. Personal data is any kind of data regarding an identified natural person or which makes it possible to identify a natural person. The major goal of the EU and Polish policy regarding personal data protection is a fair balance between the protection of the consumer's privacy and free movement of personal data. Its accomplishment requires strong restrictions in respect of collection and use of personal data. The effectiveness of personal data protection has become the priority, pursued, for example, by means of modern information and communications technologies and actions enabling achievement of the objectives. To make it possible, the European Commission resolved to amend the existing Directive of 1995, and in January 2012 it presented a draft of a general amendment of its provisions mainly reinforcing online privacy.

Conclusions

The quality of European law on consumer protection is improving. Both the European Commission and national legislation authorities are working intensely on making it more comprehensive and up-to-date. However, corrections and supplements are still needed in many areas. These include for example lack of EU regulations, that may oblige EU Member States to appoint the insured protection institution. Moreover, the protection of clients of failed investment firms requires changes, also in Poland (the increase of the amount of the guarantee or

⁴⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281.

⁴¹ Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych, tj. Dz.U. 2002, Nr 101, poz. 926 ze zm.

the shortening the time of payment of compensation). A step forward is the intensification of work, aimed at implementation of resolution procedures, both at EU level and at the level of individual Member States. Orderly liquidation authority and their budget will seek to limit the negative effects of the possible banks' bankruptcy (and investment firms), also for depositors. They will allow the rapid (2 days) and controlled liquidate bank or investment firm, when it will be necessary, maintaining their critical functions related to customers service. Problems of threatened bank will be able to solve by selling it, in whole or in part, to bank or banks with good economic and financial condition, it may also be acquired by the bridge bank, or finally it will be possible the remission or conversion of liabilities of threatened bank. The expected date of adoption of the resolution directive is April 2014.

Also, customer services provided by financial institutions also keep improving every year. Poland still fails to offer the same standards as Western European countries, and the consumer protection level is still lower. At the same time, the role of financial products in Polish households is increasing, and contracts are becoming increasingly complex, which does not make it easier for the consumer to fully understand them. Developing Polish bancassurance services market might be an example. Unfortunately, relevant provisions, protecting consumers burdened with credit and loans whose affected a group insurance contract entered into by banks with insurance companies, do not go after this. Banks decide to make use of the insurance contract, but the consumer pays the premium. Banks also violate imposed on them informing obligations to policyholders. Recommendations of the Polish Financial Supervision Authority and the Good Practice Principles do not meet the constitutional requirement to protect consumers by public authorities. The need for urgent legislative action is necessary in this situation⁴².

Ongoing improvement of the non-professional client protection schemes as well as educational actions on the existing institutions and regulations to this respect as well as on the consumers' rights and defence possibilities should become a priority for the state for which a human being is the most important value. Meanwhile, the majority of clients of financial services in Poland do not know, or know little of their consumer rights. Only a few of them are able to put into practice their knowledge. Moreover, consumers do not know the institutions that can help them. Financial institutions should not be seen as the enemy of the consumer, but as his partner, so they should insist on the amicable settlement of any disputes and inform clients about this possibility, at the stage of concluding

⁴² <http://spg.lexisnexis.pl/aktualnosc/rpo-interweniuje-ws-ochrony-konsumentow-na-rynku-uslug-bankowych> (28.03.2014).

contracts, not to mention the absolute elimination of prohibited contracts clauses. Too few people negotiate the terms of contracts and make complaints, of course in substantiated cases, when their rights are violated⁴³. Elimination of disparities between financial institutions and their retail clients, by providing consumers full knowledge about their rights (protection through information), is therefore expected and very desirable, and conducting pro-consumer policy in this area is simply essential.

It should also be noted that not all banks, in the case of consumers, are willing to flexibly use recovery programs in the form of conversion of their debt into consolidation loan. Extending loan period and reduce the value of installment credit can protect both client and bank against – uncertain when it comes to the effects and costly vindication. Finally, it is reprehensible to differentiate the customer's position, especially bank's clients using credit products. It means widespread discrimination elderly and disabled clients, leading to their financial exclusion. The catalog of banking products should also be adopted to the needs of clients from this group, especially because they usually have stable source of income in the form of a pension.

Protection of client's financial services market does not conducive the lack of one, comprehensive regulation, which might regulate the problem of dishonest financial services advertising, misleading customer. Inclusion piecemeal legislation in a number of different legal acts certainly does not help to eliminate fraudulent behavior of some financial institutions.

In summary, an effective elements of consumer protection system are: a good law, fair financial institutions and consumers aware of their rights.

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⁴³ *Konsumenci na rynku usług bankowych*, Raport, Urząd Ochrony Konkurencji i Konsumentów, Warszawa 2009, s. 11-12.

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