

Part One.
General Remarks

The System of Consumer Protection in Poland

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1. Introduction

Consumer protection was first provided for in the Polish legal system in the 1970s. Nevertheless, first attempts to strengthen customer protection were made in legal literature already in the late 1960s. The Polish Constitution of 1952 (adopted in the period of a centrally-planned economy) indirectly referred in Chapter VIII to a guarantee of protection for citizen-consumers. Pursuant to Art. 3, “the Polish People’s Republic ensures a continual rise in the level of the prosperity, health and cultural standards of the people”. As rightly indicated by Agnieszka Malarewicz, the political system granted to citizens a constitutional guarantee securing their rights within the scope of consumer protection.¹ The social and economic transformation initiated in Poland in the 1980s was also of crucial importance for fostering interest in consumer protection issues. The Council of Ministers adopted first resolutions on consumer contracts in the early 1980s. An example may be the Resolution of the Council of Ministers of June 13, 1983 on General Terms and Conditions for Retail Sales of Goods and General Warranty Conditions for Durable Goods.² Also, the Act on Prices³ was adopted, which introduced different types of prices in the Polish economy (i.e. official prices, regulated prices and contract prices). The purpose of this act was to prevent any abuse by manufacturers when they set prices for goods. However, as the consumers were generally not aware of their rights, those reforms were visible only in the wording of legal provisions and failed to be implemented in

¹ Agnieszka Malarewicz, *Konsument a reklama. Studium cywilnoprawne* (Warsaw: Wolters Kluwer, 2009), 105–106.

² The Legal Monitor (*Monitor Polski*) of 1983, no. 21, item 118.

³ Act of February 26, 1982 on Prices (Journal of Laws of 1982, no. 7, item 52, as amended).

practice.⁴ It was only after 1989, the year that saw the beginning of a radical transformation of the Polish social and political system, that the situation of Polish consumers began to change. The abandonment of socialism and adoption of a democratic political process and a market economy resulted in the necessity to amend normative acts in many areas of economic life, including consumer rights.⁵

2. The EU accession

Consumer rights were subject to a radical revision after Poland had signed the Europe Agreement.⁶ Poland was obliged to adopt legal solutions conforming to EU regulations, which also facilitated a consumer policy. Art. 69 of the Agreement listed law harmonization priorities. These may be broken down into two groups: (i) norms on legal standing and operation of commercial enterprises; and (ii) norms on commercial transactions. The latter group includes consumer protection regulations.⁷

The European Community and (subsequently) European Union law has been implemented into the Polish legal system primarily by means of acts (*ustawy*) and government ordinances (*rozporządzenia*). The formation process of modern consumer law in Poland started in the 1990s, and was closely related to the process of bringing Polish law in line with EEC regulations in force at that time. Under Art. 68 of the Europe Agreement⁸ Poland was obliged to gradually adapt its existing and future legislation to the legal system in force in the EEC countries. Mira Malczyńska-Biały has indicated that this adaptation process of

⁴ Czesława Żuławska, "O prawach konsumenta w okresie przemian," *Rocznik Nauk Społecznych. Nauki Społeczno-Ekonomiczne* 22–23, no. 1 (1994–1995): 377.

⁵ See e.g.: Rafał Mańko, "Resistance towards the Unfair Terms Directive in Poland: the Interaction Between the Consumer Acquis and a Post-Socialist Legal Culture," in *European Consumer Protection: Theory and Practice*, eds. James Devenney, & Mel Kenny (Cambridge: Cambridge University Press, 2012), 413–415 and literature cited therein.

⁶ The Europe Agreement which established the association was drawn up in Brussels on December 16, 1991. In 1993 during the Copenhagen summit of the European Council established political and economic criteria (the so-called "Copenhagen criteria"), which the countries of Central and Eastern Europe had to meet to be able to apply for accession to the Union. The official membership application for Poland was filed on April 8, 1994 in Athens (Journal of Laws of 1994, no. 11, item 38).

⁷ Zdzisław Brodecki and Ewa Gromnicka, *Układ Europejski z komentarzem* (Warsaw: LexisNexis, 2002), 99. See also e.g.: Ewa Łętowska, Monika Jagielska, Katarzyna Lis, Przemysław Mikłaszewicz and Aneta Wiewiórowska-Domagalska, "Implementation of Consumer Law in Poland," *European Review of Private Law* 15, no. 6 (2007): 873–890.

⁸ Journal of Laws of 1994, no. 11, item 38.

Polish consumer law to EU requirements should be considered in four aspects⁹: (i) health and safety; (ii) economic interests; (iii) information and education; and (iv) self-organization.

The first transposition measures in the consumer protection system were implemented starting already in 1996 by broad amendments in the Act of February 24, 1990 on Counteracting Monopolistic Practices¹⁰ to the powers and legal standing of the President of the Antitrust Office. After the 1996 central administration reform, the Antitrust Office was renamed as the Office of Competition and Consumer Protection (abbreviated to “UOKiK” in Polish; this name is still in force), and became a key guardian of protection of consumer interests.

As of January 1, 1999, as part of implementation of EU law, the Polish lawmakers introduced regulations which created and have governed the activities of *powiat* and municipal consumer ombudsmen.¹¹ This new institution reinforced institutional protection at the local government level.¹²

The obligation to amend the consumer protection law in line with the EC and (later) EU regulations, which had been taken upon by Poland when it signed the association agreements in 1992/1993, was in fact realized within several years prior to full membership in 2004. The most important period of implementation of the *acquis communautaire* from the perspective of the Polish lawmakers was that of 1998–2002.¹³ It was then that many regulations thus unknown to the Polish legal system were introduced.¹⁴ Examples of such

⁹ See e.g.: Mira Malczyńska-Biały, *Ewolucja polityki konsumenckiej w Polsce po 1989 roku* (Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego, 2012), 73–80 and literature cited therein.

¹⁰ Consolidated text, Journal of Laws of 1999, no. 52, item 547 (currently non-binding) amended by the Act of March 2, 2000 (Journal of Laws of 2000, no. 31, item 381), and Act of June 30, 2000 (Journal of Laws no. 60, item 704).

¹¹ Section 5a added by Art. 61 point 5 of the Act of July 24, 1998 Amending Certain Laws Defining the Competencies of Public Administration - in Connection with the Reform of the State (Journal of Laws no. 106, item 668, as amended) which entered into force on January 1, 1999.

¹² See: Cezary Banasiński, “Ewolucja ustawodawstwa antymonopolowego w Polsce,” in *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej (studia prawnno-ekonomiczne)*, ed. Cezary Banasiński (Warsaw: Urząd Ochrony Konkurencji i Konsumentów, 2005), 16 ff.

¹³ Monika Jagielska, *Ochrona konsumenta w Polsce – 5 lat członkostwa. Analiza stanu prawnego. Ekspertyza wykonana na zlecenie UKiE*, (Warsaw: Urząd Komitetu Integracji Europejskiej, 2009), 5. See e.g.: Ewa Łętowska, Monika Jagielska, Katarzyna Lis, Przemysław Miklaszewicz and Aneta Wiewiórowska-Domagalska, “Implementation of Consumer Law in Poland,” *European Review of Private Law* 15, no. 6 (2007): 873–890.

¹⁴ The Act of March 2, 2000 (Journal of Laws of 2000, no. 22, item 271, as amended – currently non-binding). From the point of view of consumer protection the act implemented fundamental rules governed by the following directives of the European Communities: (i) Council Directive 85/374/ECC of July 25, 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (Official Journal of the European Union

regulations include Civil Code provisions on liability for a hazardous product¹⁵ and an institution of prohibited contract clauses.¹⁶ Within this implementation framework, public law provisions were adopted, which introduced *inter alia* special proceedings on practices infringing collective consumer interests.¹⁷ It was also the time when new solutions were put into effect on the provision of (broadly understood) tourist services, including time-sharing contracts. The newly enacted Consumer Credit Act¹⁸ was the first regulation in the Polish legal system protecting consumers of financial services. The solutions provided have given rise to effective enforcement of rights by consumers themselves, but also by administrative bodies and consumer organizations. Growing consumer awareness was closely related to an obligation by the traders to

L 210 of August 7, 1985), as amended by Directive 1999/34/WE (Official Journal of the European Union L 141 of June 4, 1999), (ii) Directive 85/577/ECC of December 20, 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises (Official Journal of the European Union L 372 of December 31, 1985), (iii) Directive 93/13/EEG of April 5, 1993 on Unfair Terms in Consumer Contracts (Official Journal of the European Union L 95 of April 21, 1993), (iv) Directive 97/7/WE of May 20, 1997 on the Protection of Consumers in Respect of Distance Contracts (Official Journal of the European Union L 144 of June 4, 1997). Mentioned directives no longer in force have been replaced by new regulations.

See: 5 lat Polski w Unii Europejskiej, 329, available at https://polskawue.gov.pl/files/polska_w_ue/czlonkostwo_polski_w_ue/Historia/piec_lat_polski_w_unii_europejskiej.pdf (accessed on August 20, 2014); Beata Pachuca-Smulska, "Ewolucja regulacji ochrony konsumenta w prawie polskim z perspektywy czlonkostwa w UE," in *10 lat Polski w Unii Europejskiej*, eds. Marcin Kowalczyk and Piotr Majer (Olsztyn: Wydział Prawa i Administracji UWM, 2015), 93–110.

¹⁵ The Act defined a hazardous product, detailed principles of liability, and delineated legal responsibility of individual entities (producers and manufacturers). The regulation's purpose was to increase legal certainty of turnover.

¹⁶ Art. 385¹–385⁴ of the Civil Code contain a list of examples of clauses which may be considered to be prohibited. The Court of Competition and Consumer Protection has the power of abstract review of unfair contract provisions. Recently, these rules have changed. For more about the new regulation please see chapter written by Anna Franusz in this book.

¹⁷ Transposition of Directive 98/27/EC of the European Parliament and of the Council of May 19, 1998 on Injunctions for the Protection of Consumers' Interests was made under the Art. 24 of the Act on Competition and Consumer Protection of February 16, 2007 (Journal of Laws no. 50, item 331; consolidated text, Journal of Laws of 2017, item 227, as amended). More about the new regulation see chapter by Anna Piszcz in this book.

¹⁸ Act on Consumer Credit of July 20, 2001 (Journal of Laws of 2001, no. 100, item 1081, as amended – currently non-binding). This act transposed Directive 87/102/EEC of December 22, 1986 for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit (Official Journal of the European Union L 42 of February 12, 1987) as last amended by Directive 98/7/EC of the European Parliament and of the Council (Official Journal of the European Union L 101 of April 1, 1998). Currently, the Act of May 12, 2011 on the Consumer Credit (consolidated text, Journal of Laws of 2016, item 1528), Transposition of Directive 2008/48/EC of April 23, 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC (Official Journal of the European Union L 133 of May 22, 2008). For more information please see chapter of Edyta Rutkowska-Tomaszewska.

provide better protection. The latter started attaching increasing importance to ensuring compliance with information obligations towards consumers, as imposed by the regulations in force.¹⁹ The measures employed to implement the *acquis communautaire* included both adoption of new regulations and amendment of the existing ones (including those concerning contracts concluded under unusual circumstances). In particular, it was necessary to put in order regulations *inter alia* on distance and off-premises contracts, contracts concluded by means of distance communication, especially via the internet, including also financial services provided at distance.²⁰ The solutions contributed to strengthening of the position of the weaker party to a contract, and had a fundamental significance to consumers using the internet to conclude an ever growing number of transactions.

Most recommendations indicated by the community law were implemented prior to Poland's accession to the EU on May 1, 2004. It should be emphasized that regulations on consumer protection have been subject to considerable dynamics. If only for this reason, the EU member states are obliged to systematically introduce new regulations. Since 2004, the European regulations have been extensively amended due to new economic realities, new technologies, and the most recent financial crisis. In this publication, the authors have focused on the most recently enacted regulations. The perspectives brought to bear on the discussion will range from the most general (e.g. definition of a consumer) to specific ones (e.g. dealing with individual markets).

3. Consumer in the Polish legal system

In the EU member states there is no uniform regulatory model for consumer protection. However, it is possible to identify two principal types of protecting the weaker party to a (consumer) contract. The first type/model – used in Germany, Poland, and the Netherlands – is dispersed. The provisions relating

¹⁹The actions undertaken by the President of the Office of Competition and Consumer Protection and the Court of Competition and Consumer Protection contributed to greater consumer awareness. The Court began making entries to a register of prohibited clauses maintained by the President of the Office of Competition and Consumer Protection. The register has been essential in strengthening protection of the weaker parties to agreements.

²⁰Act on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Hazardous Product of March 2, 2000 (Journal of Laws no. 22, item 271, as amended – currently non-binding). At present, distance contracts are regulated by the Act on Consumer Rights of May 30, 2014 (consolidated text, Journal of Laws of 2017, item 683). For more on this topic: Agnieszka Jablonowska, Ewa Bieniek and Edyta Rutkowska-Tomaszewska in this book.

to consumers can be found mainly in the Civil Code, and are supplemented by separate detailed regulations. The other model is characterized by a separate, orderly set of rules set forth in a Consumer Code – this solution was adopted *inter alia* in Spain, France and in 2005 also in Italy.²¹

The Polish consumer protection system is based on private and public law regulations. In describing the Polish system, one should start with the Polish Constitution of 1997 which in Art. 76 states that “Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute”. According to verdicts of the Constitutional Tribunal, the purpose of the aforementioned Art. 76 is “the necessity to provide certain minimum statutory guarantees to all the entities, particularly to natural persons, who in spite of the fact that their relations are formed on the principle of autonomy, are at a disadvantaged position mostly, but not limited to, their economic standing, in relation to professional market players”. Therefore, the Constitutional Tribunal employs a broad interpretation of the aforementioned article.²²

Consumer protection is regulated in several, higher and lower ranking legal acts, starting from the Constitution through statutes to secondary legislation, both in the private law and public law system. Some regulations are general – universally applicable to the entire legal system, and some are very detailed, regulating a specific market area, for instance financial services,²³ tourist services (packages and timeshare),²⁴ energy markets,²⁵ and electronic media.²⁶ The primary act providing public law protection of consumers’ collective

²¹ Beata Pachuca-Smulka, “Ochrona konsumenta we Włoszech w świetle implementacji dyrektywy 2011/83/UE o ochronie konsumentów,” in *Ustawa o prawach konsumenta*, eds. Dorota Karczewska, Monika Namysłowska and Tadeusz Skoczny (Warsaw: C.H.Beck, 2015), 57.

²² The verdict of the Constitutional Tribunal of September 13, 2005, case reference no. K 38/04. A broad scope of protection is also confirmed by the resolution of the Constitutional Tribunal of February 29, 2000, case reference no. III CZP 26/99.

²³ The Act on Consumer Credit of May 12, 2011; the Act on Amending the Act on Consumer Credit and the Act on the Liability of Collective Entities for the Acts Prohibited Under Punishment of September 14, 2012 (Journal of Laws of 2012, item 1193).

²⁴ The Act on Timeshare of September 16, 2011 (Journal of Laws of 2011 no. 230, item 1370); The Act on Tourist Services of August 29, 1997 (consolidated text, Journal of Laws of 2017, item 1553, as amended).

²⁵ The Energy Law of April 10, 1997 (consolidated text, Journal of Laws of 2017, item 220, as amended).

²⁶ The Act on Protection of Certain Services Provided by Electronic Means, Based on or Consisting in Conditional Access of July 5, 2002 (consolidated text, Journal of Laws of 2015, item 1341). The Act on Provision of Services by Electronic Means of July 18, 2002 (consolidated text, Journal of Laws of 2017, item 1219).

interests in Poland is the Act of February 16, 2007 on Protection of Competition and Consumers.

Principles of private law protection of weaker market participants are laid down in a group of statutes, the most important of which are: the Civil Code and the Act of May 30, 2014 on Consumer Rights,²⁷ repealing the Act of March 2, 2000²⁸ on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Hazardous Product and the Act of July 27, 2002 on Specific Terms and Conditions of Consumer Sale and Amendments to the Civil Code (which was a transposition measure for the Directive 1999/44/EC of May 25, 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees). Another element of this system is the Act of August 23, 2007 on Combating Unfair Commercial Practices (Journal of Laws of 2007, no. 171, item 1206) Directive.

4. The concept of a consumer

4.1. The origin

The notion of a consumer in Polish law providing for consumer protection has significantly evolved over the last 25 years. The source of this evolution was implementation of EU law, the necessity to adapt national regulations to EU law, as well as social and economic changes that have taken place in Poland.

Interestingly, safeguarding consumer protection stems from different motivations under the Polish and EU laws. In Polish law the chief reason has been the necessity to protect the weaker party to contractual relationships. The necessity to protect consumers results from their relationship with traders-professionals. In this relationship, it is the consumer who is deemed to have less competence, less information, and a weaker economic standing. Therefore, the regulatory purpose is to diminish this imbalance. Under the EU law, however, the chief aim of protection is to enable a consumer to undertake proper market decisions, and to strengthen the customers' role in the single European market. In other words, what prevails under the community law is protection of market functions, while under the Polish law – protection of

²⁷ Consolidated text, Journal of Laws of 2017, item 683.

²⁸ The Act on the Protection of Certain Consumer Rights and on the Liability for Damage Caused by a Hazardous Product of March 2, 2000 (Journal of Laws no. 22, item 271, as amended).

compensatory functions.²⁹ EU law focuses on consumer rights rather than on consumer protection as such. The EU lawmakers have decided that consumer protection should be built upon consumer rights with consequence for both EU and domestic legal systems. Different models of consumer protection result from the fact that this protection does not have a general character, but rather is specific to an individual regulation and thus fragmented. As a consequence, consumer protection extends to specific situations which means that the scope and methods of protection are not uniform. Protection methods and scope in tourist services differ from those in financial services or food industry.

In Polish regulations, a normative notion of a consumer was defined for the first time in § 3 item 2 of the Regulation of the Council of Ministers of May 30, 1995 (no longer in force) on Detailed Terms and Conditions of Concluding and Performing Consumer Contracts for the Sale of Goods.³⁰ Pursuant to this regulation, a consumer was deemed to be any person who purchased goods for non-business purposes. This definition was criticized since it employed imprecise terms such as “any person” and “non-business purpose”. As delineated by the legislator, the subject here was wide-ranging and could encompass natural persons, legal persons and persons with a limited capacity to enter into legal transactions. An analogous definition was implemented in the Antitrust Act of February 24, 1990 (no longer in force): an amendment from 1996 defined a consumer as “any person” who purchases goods and services for non-business purposes.

4.2. The definition of a consumer in the Civil Code

In 2000 the definition of a consumer was introduced in Art. 384 § 3 of the Civil Code by way of the Act on Protection of Certain Consumer Rights and on Liability for Damage Caused by a Hazardous Product (Journal of Laws of 2000, no. 22, item 271³¹) pursuant to which “A consumer shall mean a person who enters into an agreement with a trader for a purpose which is not directly related

²⁹ Monika Jagielska, *Ewolucja ochrony konsumenta w prawie kolizyjnym Unii europejskiej w zakresie zobowiązań umownych* (Warsaw: C.H.Beck, 2010), 27. See: Ewa Łętowska, *Prawo umów konsumenckich* (Warsaw: C.H.Beck, 1999), 14 ff; Tomasz Pajor (text updated by Wojciech J. Katner), “Komentarz do art. 22(1) Kodeksu cywilnego,” *Kodeks cywilny. Komentarz. Część ogólna*, eds. Paweł Księżak and Małgorzata Pyziak-Szafnicka (available in Lex database).

³⁰ Journal of Laws of 1995, no. 64, item 328.

³¹ The Act of 2000 implemented into the Polish Civil Code, among others, provisions of Directive 93/13/ECC of April 5, 1993 on Unfair Terms in Consumer Contracts (Official Journal of the European Union L 95 of April 21, 1993).

to the former's business or trade". The Civil Code did not include, however, any definition of "business" or "trader", although it used them. It was assumed in the legal doctrine that the definition of a consumer from Art. 384 § 3 of the Civil Code applied generally. Although it was placed in Book Three of the Civil Code on Obligations, Title III "General Provisions on Contractual Obligations", in provisions on contract models, the definition was considered a fundamental one. However, the definition of a consumer from Art. 384 § 3 of the Civil Code was inconsistent with Directive 93/13/EEC, and as such it was not possible to use it to interpret provisions on prohibited contract clauses. Directive 93/13/EEC, as most of European Directives, defined a consumer as a natural person who enters into an agreement "for purposes which are outside his trade, business or profession".

It uses the terms of "seller" and "supplier", and not that of a "trader". The Act of 2000 was of major significance to the creation of the system of consumer rights because it implemented provisions of several directives into Polish law.³² The act implemented into the Civil Code the regulation from Council Directive of July 25, 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products (85/374/EEC),³³ amended by Directive 99/34/EC. As it was rightly pointed out by Bogusława Gnela, provisions on product liability (Art. 449¹–449¹¹ of the Civil Code) are recognized as part of consumer law, although they lead to tortious liability (a prevailing view). However, I am not going to discuss them here in more detail.³⁴ Nevertheless, one should note that the product liability regulation adopted in Poland is not compliant with Directive 85/374/EEC.³⁵ The definition from Art. 384 § 3 of the Civil Code was found to be inconsistent with the community law due to a broad definition of its subject, which included also legal persons as consumers.

³² The Act introduced the following directives to regulations outside of the Civil Code: Directive 85/577 EEC of December 20, 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, Directive 97/7/EC of May 20, 1997 on the Protection of Consumers in Respect of Distance Contracts, Directive 2002/65/EC of September 23, 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.

³³ Official Journal of the European Union L 210 of August 7, 1985.

³⁴ See: Bogusława Gnela, "Uwagi o kodeksowej definicji konsumenta oraz jej zgodności z prawem unijnym," in *Kierunki rozwoju europejskiego prawa prywatnego*, eds. Monika Jagielska, Ewa Rott-Pietrzyk and Aneta Wiewiórowska-Domagalska (Warsaw: C.H.Beck, 2012), 169–186.

³⁵ Official Journal of the European Union L 141 of June 4, 1999. See: Bogusława Gnela, "Odpowiedzialność za produkt (uwagi o polskiej regulacji)," *Państwo i Prawo* 9 (2009): 39–40.

4.3. The definition of a consumer in the general part of the Civil Code

Art. 384 § 3 of the Civil Code was repealed by the Act of February 14, 2003 (Journal of Laws no. 49, item 408) which entered into force on September 25, 2003 and introduced Art. 22¹ to the general part of the Civil Code, which incorporated a new definition of consumer.

Art. 22¹ initiated an extensive discussion on the definition of a consumer among Polish legal scholars.³⁶ This discussion confirmed that the notion of a consumer was crucial for the entire system of the Polish law. It should be noted that this notion is a functional one, and its boundaries depend both on the type of the market to which it applies and on the scope of protection provided by the legislator. Doctrinal disputes have proven that it is not straightforward to define this notion: consumer protection is not uniform and different legal acts feature different definitions of a consumer. The definition from Art. 22¹ of the Civil Code is based on three criteria – a substantive one, limiting the category of consumers to natural persons; a material one – referring to execution of a legal action; and a functional one – highlighting that it is not directly related to the consumer's trade or profession.³⁷

Pursuant to Art. 22¹ of the Civil Code, a consumer was understood to be “a natural person performing a legal act which is not directly related to his business or professional activity”.

Hence in the Polish legal system, the definition is narrow, limiting consumers to natural persons. However, this has not been a requirement of the community law. Numerous EU regulations provide for a similar limitation, but

³⁶ See: Sławomir Koroluk, “Nowa definicja konsumenta w k.c.,” *Radca Prawny* 26 (2003): 26; Piotr Mostowik, “Uwagi dotyczące rozwoju prawa konsumenckiego na tle nowelizacji kodeksu cywilnego z 2003 r.,” *Radca Prawny* 4 (2003): 37; Klara Kańska, “Pojęcie konsumenta w kodeksie cywilnym na tle tendencji europejskich,” *KPP* 1 (2004): 7; Monika Rejdak, “Definicja konsumenta w rozumieniu kodeksu cywilnego (art. 22¹ k.c.),” *Rejent* 1 (2006): 118; Maksymilian Pazdan in *System Prawa Prywatnego. Volume I*, (Warsaw: C.H.Beck, 2012), 1110 and following; Jerzy Strzebińczyk in *Kodeks cywilny. Komentarz*, eds. Edward Gniewek and Piotr Machnikowski (Warsaw: C.H.Beck, 2013), 56–58; Przemysław Mikłaszewicz, “Przepisy wprowadzające Kodeks cywilny,” in *Kodeks cywilny. Komentarz. Tom I. Część ogólna. Własność i inne prawa rzeczowe* (art. 1–352 KC), ed. Konrad Osajda (Warsaw: C.H.Beck, 2013), 383–387; Bogusława Gnela, *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym* (Warsaw: Wolters Kluwer, 2013); Tomasz Pajor (text updated by Wojciech J. Katner), “Komentarz do art.22(1) Kodeksu cywilnego,” in *Kodeks cywilny. Komentarz. Część ogólna*, eds. Paweł Księżak and Małgorzata Pyziak-Szafnicka (available in Lex database).

³⁷ See also: Tomasz Sokołowski in *Kodeks cywilny. Komentarz. Tom 1, Część ogólna*, ed. Andrzej Kidyba (Warsaw: C.H.Beck, 2009), 106.

there are others which do not introduce it.³⁸ Further, in domestic legal orders of countries such as France, the United Kingdom, Austria or Spain, the definition of consumer has not been limited to natural persons.

The material criterion refers to execution of a legal action. Following Germany's lead, the Polish lawmakers adopted a broad approach here. The definition includes also unilateral legal actions. At the same time, the law did not specify the other party to a contract. Clearly, if the other party is also a consumer, no protection should be required. Consequently, both legal scholars and practitioners have criticized this solution on the grounds that it required a reference to the systemic and teleological interpretation (*wykładnia celowościowa*) to limit legal actions only to those undertaken with a trader-professional.³⁹

The third criterion is the most significant one. First of all, it provides for an absence of an immediate relation between a legal action performed by "a natural person" and his or her trade or profession. The lawmakers emphasized that the purpose of the said legal action is to satisfy own, personal needs of "a natural person". Its foremost aim was to attend to private needs of a natural person and/or those of his or her family.⁴⁰ The negative formula used in the definition gives it a general character, and takes exception to any relation between the legal action and a trade or profession. Therefore, under this legal solution a trader or a professional (in their professional capacity) cannot be consumers.

In Polish law an entrepreneur is deemed to be any entity (a natural person, a legal person and a non-corporate organizational unit which is not a legal person, but has legal capacity under a separate legal act) conducting an economic or professional activity on its own behalf. The entrepreneur has been defined in Art. 43¹ of the Civil Code⁴¹ and in Art. 4 point 1 of the Act of July 2, 2004 on Freedom of Business Activity (consolidated text, Journal of Laws of 2016, items 1829, 1948, 1997, 2255).

³⁸ Directive no. 90/314/EEC of June 13, 1990 on Package Travel, Package Holidays and Package Tours (Official Journal of the European Union L 158 of June 23, 1990) New Directive (EU) 2015/2302 from July 1, 2018, in this book about the new regulation Katarzyna Frątczak.

³⁹ See: Józef Frąckowiak, "Instytucje prawa handlowego w Kodeksie cywilnym," *Rejent* 6 (2003): 15; also the provision of the Court of Appeal in Szczecin of August 28, 2012, case reference no. I ACz 399/12.

⁴⁰ See verdict of the Supreme Court of September 26, 2007, case reference no. IV CSK 122/07, under which a member of a building (cooperative) society who has a cooperative right to a housing premises is deemed to be a consumer.

⁴¹ Art. 43¹. Concept of entrepreneur (trader). An entrepreneur is a natural person, a legal person or an organizational unit referred to in Art. 33¹ § 1 conducting business or professional activity on its own behalf.

A clear attribute of a trader (an entrepreneur) is his business activity. The Civil Codes does not define this term. The legal doctrine commonly makes use of the legal definition in Art. 2 of the Act of July 2, 2004 on Freedom of Business Activity (consolidated text, Journal of Laws of 2016, items 1829, 1948, 1997, 2255),⁴² which refers to a profit-making activity conducted in an organized, continuous fashion and of professional character. Nevertheless, the “professional” aspect of this definition raised certain doubts in the doctrine.⁴³

By exclusion, the definition of a consumer underscores that a consumer may only be an entity which is not an entrepreneur, the legal transaction he undertakes is not related to a business or a professional end, and the other party to this legal transaction is an entrepreneur/trader.

4.4. Definition of a consumer in the Act of May 30, 2014 on Consumer Rights⁴⁴

Until implementation of the Consumer Rights Directive⁴⁵ (the “CRD”), a “consumer” had been defined as a natural person undertaking a legal transaction which was not directly connected with his or her business or profession. After the CRD was implemented, a consumer has been deemed to be a natural person undertaking a legal transaction with a trader which is not directly connected to the former’s business or profession (changing accordingly Art. 22¹ of the Civil Code⁴⁶). The new regulation clearly indicates that a consumer may only be a person concluding a contract with a trader (an entrepreneur) and not with any other entity. In spite of the fact that the definition from 2003 had been roundly criticized by legal scholars, it was made more precise only after 11 years of use.⁴⁷

⁴² Art. 2. Economic activity shall mean profit-gaining activity in the fields of production, construction, commerce, services and in the prospecting, exploration and extraction of minerals from deposits, as well as a professional activity carried out in an organized and uninterrupted manner.

⁴³ See: Cezary Kosikowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz* (Warsaw: LexisNexis, 2011), 17–37.

⁴⁴ Act of May 30, 2014 on Consumer Rights (Journal of Laws of 2014, item 827). The act entered into force on December 25, 2014 and implemented the Consumer Rights Directive no. 2001/83/EU into Polish law.

⁴⁵ Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Official Journal of the European Union L 304 of November 22, 2011).

⁴⁶ Art. 44 point 1 of the Act of May 30, 2014 on Consumer Rights (consolidated text, Journal of Laws of 2017, item 683) which entered into force on December 25, 2014.

⁴⁷ Małgorzata Sieradzka, “Konsument w świetle ustawy o prawach konsumenta – czy zmiany idą w dobrym kierunku?” in *Ustawa o prawach konsumenta*, eds. Dorota Karczewska, Monika

The definition from 2003 resulted in quite astonishing opinions in academic publications allowing even for consumer-to-consumer (C2C) relationships under Art. 22¹ of the Civil Code.⁴⁸ Not surprisingly, this point of view met with strong objections and criticism from legal scholars.

The legal doctrine is also critical of the omission to extend the definition of a consumer to include entities other than natural persons. In some EU countries, such an extension has been made to include micro- and small enterprises which are legal entities or entities without the status of a legal person.⁴⁹

The CRD definition of a consumer (in Art. 2(1)) was extensively discussed in the Polish Parliament (*Sejm*) when the act was being drafted. The definition adopted from the CRD would have allowed to apply the provisions of the Act on Consumer Protection to natural persons undertaking an activity within their trade, business, craft or profession, acting also for the purpose outside their trade, business, craft or profession (a mixed legal transaction) with the non-business purpose predominating. However, the CRD definition was not adopted after all. The discussions led to (reasonable) doubts as to the ability to distinguish between business and non-business scope of every legal transaction undertaken by an entity expecting consumer protection. In the end, it was decided that the definition of a consumer as set forth in motive 17 of the CRD would not be implemented into the Polish legal system. Nevertheless, it can always form a basis for interpretation in particular cases. As an aside comment, one should note that implementation of the CRD into German law is consistent with motive 17. The German law thus broadened the definition of a consumer by introducing the word “prevailing” in response to demands from the doctrine. This has resolved the problem of legal actions of mixed character. Only practice will show if this path is the correct one.⁵⁰

Amendments to the definition of a consumer in Polish law have been subsequently suggested on numerous occasions. One such proposal was made

Namysłowska and Tadeusz Skoczny (Warsaw: C.H.Beck, 2015), 251 ff; Wojciech J. Katner, “Wstępne uwagi na temat nowych przepisów o ochronie praw konsumenta w zakresie rękojmi i gwarancji przy sprzedaży” in *Ustawa o prawach konsumenta*, eds. Dorota Karczevska, Monika Namysłowska and Tadeusz Skoczny (Warsaw: C.H.Beck, 2015), 266.

⁴⁸ Piotr Kukuryk presents an isolated view. See: Piotr Kukuryk, “Definicje konsumenta w kodeksie cywilnym (obecnym i przyszłym) w kontekście najnowszych unijnych dyrektyw konsumenckich,” *PPH* 5 (2014): 25.

⁴⁹ Wojciech J. Katner, “Wstępne uwagi na temat nowych przepisów o ochronie praw konsumenta w zakresie rękojmi i gwarancji przy sprzedaży,” in *Ustawa o prawach konsumenta*, eds. Dorota Karczevska, Monika Namysłowska and Tadeusz Skoczny (Warsaw: C.H.Beck, 2015), 266.

⁵⁰ Beata Giesen, “Implementacja dyrektywy 2011/83/UE o prawach konsumentów do niemieckiego porządku prawnego,” in *Ustawa o prawach konsumenta*, eds. Dorota Karczevska, Monika Namysłowska and Tadeusz Skoczny (Warsaw: C.H.Beck, 2015), 18.

inter alia in 2009 during proceedings of the Civil Law Codification Committee. The proposal was to extend consumer protection to include “minor enterprises” (*mikro i mały przedsiębiorca*). However such a category does not exist in EU law,⁵¹ which was the reason why this proposal was rejected in the end.

A fast evolving marketplace, in particular due to new internet technologies and platforms to conduct business, may in the future upend the traditional definition of a consumer. Ever more often consumers use electronic media to conclude transactions that best suit their needs and offer a best price. The web-based portals selling products and services, such as eBay, Amazon Marketplace (goods), Uber, BlaBlaCar (passenger transport services), Airbnb (accommodation), Zopa (financial services) are growing very dynamically.⁵² From the legal standpoint, this growth is based on three parties: the buyer, the seller, and the intermediation platform. The Digital Single Market⁵³ will require that adequate roles be delineated for each of these parties, as well as a new definition of consumer.

5. The model of the average consumer

Notwithstanding the discussion on the notion of a consumer, the Polish system of law also defines the average consumer. This latter term was introduced with the implementation of Directive 2005/29/EC Concerning Unfair Business-to-Consumer Commercial Practices (OJ L 149 of June 11, 2005) to the Act of August 23, 2007 on Combating Unfair Market Practices (Journal of Laws of 2007, no. 171, item 1206, as amended).⁵⁴ Art. 2 point 8 defines the average consumer as the one who is reasonably well-informed, observant and circumspect. The model of the average consumer adopted in Poland corresponds fully to the

⁵¹ Wojciech J. Katner, “Wstępne uwagi na temat nowych przepisów o ochronie praw konsumenta w zakresie rękojmi i gwarancji przy sprzedaży,” in *Ustawa o prawach konsumenta*, eds. Dorota Karczewska, Monika Namysłowska and Tadeusz Skoczny, 266.

⁵² See: Christoph Busch, Hans Schulte-Nolke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, “The Rise of the Platform Economy: A New Challenge for EU Consumer Law?,” *Journal of European Consumer and Market Law* 1 (2016).

⁵³ See: Beata Pachuca-Smulka, “Konsument na jednolitym rynku cyfrowym,” in *Ochrona prawna konsumenta na rynku mediów elektronicznych*, eds. Maria Królikowska-Olczak and Beata Pachuca-Smulka (Warsaw: C.H.Beck, 2015), 3 ff.

⁵⁴ See: Arkadiusz Michalak, *Przeciwdziałanie nieuczciwym praktykom rynkowym* (Warsaw: C.H.Beck, 2008), 63 ff; Robert Stefanicki, *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym* (Warsaw: LexisNexis, 2009), 188 ff; Małgorzata Sieradzka, *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym* (Warsaw: Wolters Kluwer, 2008), 56 ff.

model which has been framed by verdicts of the European Union courts.⁵⁵ In light of verdicts of both Polish and EU courts, the predominant view holds that in evaluating a model of the average consumer one should take into account social, cultural and linguistic factors specific to a given consumer or a particular group of consumers. A consumer or a particular group of consumers is therefore understood to be a uniquely identifiable group of consumers particularly susceptible to a commercial practice or to the underlying product because of certain characteristics such as age, physical or mental infirmity or credulity. Further, an evaluation of the average consumer should in each case take into account real social and economic conditions.⁵⁶

6. Summary

Starting in the 1990s, the Polish lawmakers begun to amend domestic regulations adapting them to EU requirements. The changes introduced have not always been direct transpositions of the community or EU law. However, these legal steps have always been in the direction of the single market.

The creation of the Digital Single Market raises new legal challenges, which may necessitate and eventually lead to full harmonisation. Nevertheless it should be highlighted that creation of uniform consumer protection in the EU and strengthening protection of consumers in the digital single market as well as financial markets will necessarily lead to a full harmonisation in these areas. Such changes may also modify, and perhaps finally make uniform the definition of a consumer under EU law.

⁵⁵ Judgment of the European Court of Justice of July 16, 1998, case reference no. C-210/96 *Gut Springenheide*; judgment of the European Court of Justice of April 4, 2000, case reference no. C-465/98; judgment of the European Court of Justice of May 16, 1989, case reference no. C-382/87 *Buet*; judgement of the European Court of Justice of July 6, 1995, case reference no. C-470/93 *Mars*.

⁵⁶ Judgment of the Court of Appeal in Warsaw of September 29, 2011, case reference no. VI ACA 747/11.