

# **‘Business and human rights: promoting environmental protection through enforcement of consumer rights’**

**Poland**

November 2022

Contractor: Helsinki Foundation for Human Rights

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## Introduction

The aim of this report is to analyse intersections between consumer and environmental protection laws in Polish legal system and to identify potential gaps in the regulations. Greenwashing practices, products harmful for the environment as well as disregard for environmental protection in the operations of companies violate not only environmental principles but also consumers' rights. Enforcement of consumer rights could, therefore, not only protect consumers from misinformation and unlawful practices but also contribute to the protection of environment and environmental awareness of business. Therefore, authors of this report look into Polish regulations to identify such possibilities.

The research shows that there are intersections between consumer and environmental protection laws in Polish regulation. They are especially visible in regulations of environmentally unfriendly advertising. General consumer protection regulations can be used in environmental cases as well. However, the practice shows that neither of these options are commonly used in practice. The problem lies mostly with the application of the regulation by administrative authorities and lack of public awareness. There is also a self-regulation mechanism which seems to fill at least some of the gaps in the public regulation.

The authors consulted legal sources such as Environmental Protection Act (hereinafter: EPA)<sup>1</sup>, Competition and Consumer Protection Act (hereinafter: CCPA)<sup>2</sup> and the Act on Counteracting Unfair Market Practices (hereinafter: CUMP)<sup>3</sup> or the Collective Claims Act (hereinafter: CCA)<sup>4</sup>. The authors also drew on their experience in the subject under review, as their organisation has been dealing with these issues for years.

In the course of developing the report, the authors interviewed an attorney-at-law from the legal environmental organisation ClientEarth Poland Foundation, two specialists from the Advertising Council, two members of the OECD National Contact Point and a lawyer who has experience in the theory of consumer law (as he is a university lecturer and a climate activist as well).

### 1. Scope of consumer protection laws and environmental laws

This chapter is divided into four parts. Firstly, the legal provisions regulating advertising are analysed. Due to the fact that Polish law specifically regulates environmental advertising, this topic has been distinguished from other consumer law regulations. The second part focuses on access to environmental information. It discusses, *inter alia*, how the principles of the Aarhus Convention are implemented into Polish law and the practical aspects of their application. The third part discusses more general provisions of consumer law and their practical application in environmental cases. Finally, the main gaps and intersections are discussed. The final chapter is the result of legal research as well as consultation with specialists.

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<sup>1</sup> Environmental Protection Act of 27 April 2001, consolidated text, Journal of Laws 2021.1973 (*Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska*, t.j. Dz. U. z 2021 r. poz. 1973 z późn. Zm.).

<sup>2</sup> Competition and Consumer Protection Act of 16 February 2007, consolidated text, Journal of Laws 2021.275 (*Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów*, t.j. Dz. U. z 2021 r. poz. 275).

<sup>3</sup> Act on Counteracting Unfair Market Practices of 23 August 2007, consolidated text, Journal of Laws 2017.2020 (*Ustawa z dnia 23 sierpnia 2007 r. o przeciwdziałaniu nieuczciwym praktykom rynkowym* t.j. Dz. U. z 2017 r. poz. 2070).

<sup>4</sup> Collective Claims Act of 17 December 2009, consolidated text, Journal of Laws 2020.446 (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym* t.j. Dz. U. z 2020 r. poz. 446).

## Environmentally unfriendly advertising

Environmentally unfriendly advertising is mainly regulated in Article 80 of the EPA which forbids advertising or other promotion of goods or services that contain content promoting a consumption model contrary to the principles of environmental protection and sustainable development, and in particular content that use images of wildlife to promote products and services negatively affecting the natural environment.

“Advertising” or “promotion” in this context are understood widely.<sup>5</sup> In opinion of some commentators “advertising” and “promotion” cover not only actions for the economic purposes but also e.g. social or political advertising.<sup>6</sup> However, others suggest that since the provision says explicitly about “goods and services”, social and political campaigns are not within its scope.<sup>7</sup> Authors of this report share the second view. Even though it would be advisable to broaden the scope of Article 80 of the EPA, the current text does not allow for such interpretation. Moreover, information campaigns commissioned by companies would also not be covered. The form or medium used to communicate the message is not relevant – it can be e.g. television, radio or a poster.<sup>8</sup>

Principles of environmental protection are contained in Articles 5 to 12 of the EPA as well as in other Polish acts, EU and international law.<sup>9</sup> Sustainable development is a constitutional principle<sup>10</sup> which is also defined in article 3(50) of the EPA.<sup>11</sup>

The specific example of the violation of Article 80 of the EPA, particularly harmful in the legislator’s view is content that uses images of wildlife to promote products and services negatively affecting the natural environment. Wildlife is understood as inanimate as well as animate nature.<sup>12</sup> Objects must be pictured in the environment in which they occur in nature.<sup>13</sup> However, not every use of the images of wildlife is prohibited – only the one that promotes products and services that negatively affect the natural environment. It was confirmed by the Appellate Court in Warsaw in case where an environmental organisation sued a beer producer for using an image of wildlife in their advertisement. The court stated that it is not enough that the image is used nor that a product has any impact on environment (as nowadays every product has some environmental impact). The impact has to be

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<sup>5</sup> Nestoruk, I. B. (2012), ‘Prawo ochrony środowiska’ in: Namysłowska M. (ed.), *Reklama. Aspekty prawne*, Warsaw, Wolters Kluwer Polska, pp. 381 – 383; Nestoruk, I. B. (2011), ‘Marketing ekologiczny w prawie polskim - przegląd regulacji’, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego Prace z Prawa Własności Intelektualnej*, No. 3, pp. 143-167.

<sup>6</sup> I. B. (2011), ‘Marketing ekologiczny w prawie polskim - przegląd regulacji’, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego Prace z Prawa Własności Intelektualnej*, No. 3, pp. 143-167.

<sup>7</sup> Bar, M. (2019), ‘Art. 80 [Reklama]’ in: Górski, M., Pchałek, W. et al (eds.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wydawnictwo C.H. Beck, 3. Edition, pp. 203-206.

<sup>8</sup> Nestoruk, I. B. (2012), ‘Prawo ochrony środowiska’ in: Namysłowska M. (ed.), *Reklama. Aspekty prawne*, Warsaw, Wolters Kluwer Polska, pp. 381 – 383.

<sup>9</sup> Bar, M. (2019), ‘Art. 80 [Reklama]’ in: Górski, M., Pchałek, W. et al (eds.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wydawnictwo C.H. Beck, 3. Edition, pp. 203-206; Poland, Appellate Court in Warsaw (*Sqd Apelacyjny w Warszawie*) VI ACa 621/09, 8 December 2009

<sup>10</sup> Article 5 of the Constitution of the Republic of Poland of 3 April 1997, *Journal of Laws* 78.483 (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. Dz. U. Nr 78, poz. 483 z późn. zm.*) (hereinafter: Constitution)

<sup>11</sup> According to Article 3(5) of the EPA sustainable development is social and economic development, in which political, economic and social activities are integrated with respect for the balance of nature and the sustainability of the basic natural processes in order to guarantee the possibility of satisfying the basic needs of particular communities or citizens of both the present and future generations.

<sup>12</sup> Rakoczy, B. (2013), ‘Art. 80’ in: Bukowski, Z., Czech, E. K. et al. (eds.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wolters Kluwer Polska.

<sup>13</sup> Rakoczy, B. (2013), ‘Art. 80’ in: Bukowski, Z., Czech, E. K. et al. (eds.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wolters Kluwer Polska.

graver – the model of consumption should destroy or degrade the environment and lead it to an imbalance.<sup>14</sup>

There are two ways to enforce this prohibition. First of all, Article 80c of the EPA legitimises social organisations to apply to the competent administrative authorities to undertake measures to stop the advertising violating rules described in Article 80. The social organisations are e.g. labour, municipal and cooperative organisations as well as other associations<sup>15</sup> and foundations<sup>16</sup>. This provision does not constitute a separate competence for the administrative authorities to take measures – the authorities have to be specifically authorised by law to undertake action in the particular circumstances.<sup>17</sup> Therefore, it is only reinforcement of the constitutional right to the submission of petitions, applications and complaints.<sup>18</sup> The following administrative authorities are empowered to act on a complaint of an organisation:

- a) The Trade Inspection which controls the legality and reliability of the activities of entrepreneurs in the field of production, trade and services.<sup>19</sup> The Trade Inspection may, in the course of an inspection, order the restriction of the placing on the market, the suspension of the placing on the market or the withdrawal of products or services, or the immediate rectification of any irregularities found, if this is necessary for reasons of safety or of consumer or national economic interest.<sup>20</sup> The inspection may also issue a follow-up order<sup>21</sup> or statement.<sup>22</sup>
- b) The Office of Competition and Consumer Protection (hereinafter: UOKiK) may take action on a violation of the CCPA if the specific practice infringes collective consumer interests. The procedure and potential steps that can be taken are detailed below.
- c) In the case of advertisements broadcasted on television and radio, the Chairperson of the National Broadcasting Council may oblige the service provider to cease the illegal activity<sup>23</sup> and impose a fine.<sup>24</sup>
- d) In cases of pharmaceutical or veterinary advertising the Chief Pharmaceutical Inspector and the Chief Veterinary Officer who supervises compliance of the advertising with law can order to cease advertising of medical products.<sup>25</sup>

Second of all, a civil judicial claim can be brought by environmental organisations in case of breach of Article 80. According to the Article 328 of the EPA only environmental and not all social organizations

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<sup>14</sup> Poland, Appellate Court in Warsaw (*Sąd Apelacyjny w Warszawie*) VI ACa 621/09, 8 December 2009

<sup>15</sup> Gruszecki, K. (2019), 'Art. 80(c)' in: Gruszecki, K. (ed.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wolters Kluwer Polska. See Article 5(2)(5) of the Code of Administrative Procedure of 14 June 1960, consolidated text, Journal of Laws 2021.735 (*Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego t.j. Dz. U. z 2021 r. poz. 735 z późn. zm.*).

<sup>16</sup> Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*) II OPS 4/2005, 12 December 2005 r.

<sup>17</sup> Bar, M. (2019), 'Art. 80(c)' in: Górski, M., Pchałek, M., Radecki, W, et al. (eds), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wydawnictwo C.H. Beck.

<sup>18</sup> Article 63 of the Constitution.. It should be read together with Article 31(1)(1) of the Code of Administrative Procedure. See also Nestoru, I.B. (2011), 'Marketing ekologiczny w prawie polskim - przegląd regulacji', *Zeszyty Naukowe Uniwersytetu Jagiellońskiego Prace z Prawa Własności Intelektualnej* No. 3, pp. 143-167.

<sup>19</sup> Article 3(1) of the Trade Inspection Act of 15 December 2000, consolidated text, Journal of Laws 2020.1706 (*Ustawa z dnia 15 grudnia 2000 r. o Inspekcji Handlowej t.j. Dz. U. z 2020 r. poz. 1706*) (hereinafter: Trade Inspection Act).

<sup>20</sup> Article 18(1)(1) of the Trade Inspection Act.

<sup>21</sup> Article 32 of the Trade Inspection Act.

<sup>22</sup> Article 33 of the Trade Inspection Act.

<sup>23</sup> Article 10(3)-(5) of the Broadcasting of 29 December 1992, consolidated text. Journal of Laws 2022.1722 (*Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji t.j. Dz. U. z 2022 r. poz. 1722*) (hereinafter: Broadcasting Act).

<sup>24</sup> Article 52(2) of the Broadcasting Act.

<sup>25</sup> Article 62 of the Farmaceutical Law of 6 September 2001, consolidated text, Journal of Laws 2021.1997 (*Ustawa z dnia 6 września 2001 r. Prawo farmaceutyczne t.j. Dz. U. z 2021 r. poz. 1977 z późn. zm.*).

are authorised to bring a claim.<sup>26</sup> They can request the court to order ceasing advertising or promotion of a good or service. They cannot request damages.<sup>27</sup> Consequently organisations do not have to prove damage or show legal interest in the proceedings – this mechanism serves as an *actio popularis*. Commentators take different positions as to which entity has standing to be sued in such proceedings. Some are of the view that only the entity issuing the advertisement can be sued.<sup>28</sup> However, most of them are of the opinion that the producer of the good or service, advertising agency as well as the entity issuing the advertisement have standing in such proceedings.<sup>29</sup> In practice, the second view was confirmed.<sup>30</sup>

Even though the prohibition stemming from Article 80 of the EPA seems to be broad enough to cover most greenwashing practices, it is rarely used in practice. As to date to the best knowledge of the authors there were three cases in which environmental organisations brought a claim to enforce the prohibition and only one of them was successful.

One of the cases dismissed by the court is already described above.<sup>31</sup> In another one an environmental organisation brought a claim against a bank that used an image of a bison in their advertisement. The court was of the opinion that even though the bank's logo is not a real image of wilderness, it is covered by Article 80. This is because in the public perception the image constitutes an element of wilderness, even if its representation is made through a pictogram. However, the court found that the plaintiff had not proved that the image in question promotes a consumption model that is contrary to the principles of environmental protection and sustainable consumption, or that the products, services and banking activities bearing the defendant's logo have a destructive, damaging effect on the environment.<sup>32</sup>

The successful case was a case brought by the Frank Bold Foundation against a car mechanic who offered a diesel particulate filter removal and deactivate service on his website and advertising portals. Driving a vehicle without such filter is harmful to the environment and illegal. The plaintiff requested an expert opinion regarding the negative impact of the lack of filters on the environment. According to the opinion commissioned by a court, the lack of a particulate filter in a vehicle significantly increases the amount of harmful substances in the form of soot emitted into the atmosphere and highly toxic and carcinogenic exhaust fumes, which are unhealthy for both the car user and the entire environment. Consequently, the court ordered the defendant to remove the advertisements and to stop promoting the filter removal service.<sup>33</sup> The case also brought a surprising finding regarding the lack of preparation of some civil courts to conduct environmental proceedings and revealed their ignorance of the regulations contained in the EPA.<sup>34</sup> This may lead to a conclusion that civil courts are not suitable for dealing with such environmental cases. However, due to the negligible number of such cases, this conclusion may be premature.

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<sup>26</sup> Environmental organisations are social organisations whose statutory objective is the protection of the environment (Article 3(16) EPA)

<sup>27</sup> Rakoczy, B. (2013), 'Art. 328' in: Bukowski, Z., Czech, E. K. et al. (eds.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wolters Kluwer Polska

<sup>28</sup> Rakoczy, B. (2013), 'Art. 328' in: Bukowski, Z., Czech, E. K. et al. (eds.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wolters Kluwer Polska.

<sup>29</sup> Gruszecki, K. (2019), 'Art. 328' in: Gruszecki, K. (ed.), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wolters Kluwer Polska. Bar, M. (2019), 'Art. 328' in: Górski, M., Pchałek, M., Radecki, W, et al. (eds), *Prawo ochrony środowiska. Komentarz*, Warsaw, Wydawnictwo C.H. Beck.

<sup>30</sup> Poland, Appellate Court in Warsaw (*Sąd Apelacyjny w Warszawie*) VI ACa 621/09, 8 December 2009; Poland, Appellate Court in Warsaw (*Sąd Apelacyjny w Warszawie*) VI ACa 666/09, 10 January 2010.

<sup>31</sup> Poland, Appellate Court in Warsaw (*Sąd Apelacyjny w Warszawie*) VI ACa 621/09, 8 December 2009

<sup>32</sup> Poland, Appellate Court in Warsaw (*Sąd Apelacyjny w Warszawie*) VI ACa 666/09, 10 January 2010.

<sup>33</sup> Poland, Regional Court in Jelenia Góra (*Sąd Okręgowy w Jeleniej Górze*) I C 959/18, 12 March 2020 r. .

<sup>34</sup> One of the courts providing legal aid in the case only became aware of the subject matter of the case and the content of the legislation during the hearing; opinion of a legal practitioner based on their professional experience

Article 80 of the EPA is not the only regulation on environmentally unfriendly advertising in the Polish legal system. Below other regulations are briefly introduced.

Article 16b(3)(5) of the Broadcasting Act, which implements the 2010/13/UE Directive<sup>35</sup>, provides that the commercial communication cannot encourage behaviour that endangers health, safety or environmental protection. Violation of this prohibition is subject to sanctions imposed by the Chairperson of the National Broadcasting Council, namely prohibition of broadcasting<sup>36</sup> or a fine.<sup>37</sup> The scope of this provision is different than the one of Article 80 of the EPA. It prohibits advertising in the narrower meaning of the Broadcasting Act.<sup>38</sup> However, at the same time, it prohibits any advertising that could threaten environmental protection, without referring to the consumption model.

According to Article 36(2) of the Press Law<sup>39</sup> announcements and advertisements must not breach the law or the principles of social co-existence.<sup>40</sup> This includes environmental law and Article 80 of the EPA. As the Press Law does not contain any additional measure for consumers, liability for violations of Article 36 is pursued on the general principles.<sup>41</sup> Therefore, in environmental advertisement cases it will be the above mentioned Article 328 of the EPA. It can be reinforcement of measures already contained in the EPA.

### Out-of-court procedure

Ecological advertising is also regulated in the Advertising Code of Ethics issued by the Advertising Council, an organisation that created a system of self-regulation in advertising.<sup>42</sup> The Advertising Code of Ethics is, therefore, not a binding law. Chapter V of the Code contains a set of rules for advertising using ecological information. According to the regulation advertising:

- a) should not damage public confidence in properly implemented environmental measures;<sup>43</sup>
- b) should not exploit a lack of knowledge of its audience regarding environmental protection;<sup>44</sup>
- c) should not mislead consumers, including, in particular, by misrepresenting characteristics of products or environmental actions taken by an advertiser. Advertisements referring to specific products or activities must not unduly extend an effect of environmental advertising to an entire activity of the advertiser;<sup>45</sup>
- d) if it contains ecological information it should be related to characteristics of an advertised product;<sup>46</sup>

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<sup>35</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

<sup>36</sup> Article 10(3)-(5) of the Broadcasting Act.

<sup>37</sup> Article 52(.2) of the Broadcasting Act.

<sup>38</sup> Article 4(17) of the Broadcasting Act defines advertising commercial communication from a public or private entity, in connection with its economic or professional activity, aimed at promoting the sale or use of goods or services for consideration; self-promotion is also advertising.

<sup>39</sup> Press Law of 26 January 1984, consolidated text, Journal of Laws 2018.1914 (*Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe t.j. Dz. U. z 2018 r. poz. 1914*).

<sup>40</sup> This provision is also applicable to radio and television as per Article 3 of the Broadcasting Act.

<sup>41</sup> Article 37 Press Law.

<sup>42</sup> The Advertising Council is a non-governmental organisation that created and manages a system of self-regulation in the field of advertising. The organisation comprises branch associations as ordinary members and companies as supporting members. The aim of the Advertising Council is to create, promote and protect the principles to be followed by advertising entrepreneurs. See more on <https://radareklamy.pl/en/home-en/> [accessed: 05.09.2022].

<sup>43</sup> Article 33 of the Advertising Code of Ethics

<sup>44</sup> Article 34 of the Advertising Code of Ethics

<sup>45</sup> Article 35 of the Advertising Code of Ethics

<sup>46</sup> Article 36 of the Advertising Code of Ethics

- e) if it contains information such as 'environmentally friendly' or 'ecologically safe', it should not be misleading. Information indicating the effect of the product should be available for consumers;<sup>47</sup>
- f) if it informs about lack of or reduction of harmful substances, it should not be misleading;<sup>48</sup>
- g) related to waste management is permissible as long as a recommended method is available to a significant proportion of consumers. Otherwise, the extent and manner of access to the methods should be indicated.<sup>49</sup>

Complaints in cases of breach of the Advertising Code of Ethics can be submitted by natural persons, legal persons and organisational entities without legal personality.<sup>50</sup> They are dealt with by the Advertising Ethics Committee. If the entity against which the complaint is filed is a member of the Council, the Committee can adopt a resolution regarding the complaint. If the entity is not a member the Committee can adopt:

1. a resolution if an advertiser agrees to participate in the procedure; or
2. an opinion if an advertiser refuses to be a party of the proceedings.

If the complaint is found to be justified, the Committee will in its resolution confirm an infringement, recommend that the advertisement should be amended or that it should be discontinued.<sup>51</sup>

The website of the Advertising Council contains a tab "Green Project", in which the Council informs about the planned extension of the provisions of the Code of Ethics relating to environmental advertising.<sup>52</sup> Furthermore, the Council adopted a position paper, according to which, the Committee found numerous cases of greenwashing such as the use of terms 'ecological', 'environmentally friendly' or 'eco'. The paper calls for an end to the excessive and arbitrary use of these terms.<sup>53</sup>

There is a certain number of cases that the Committee dealt with that relate to ecological advertising.

One of the Committee's opinion dealt with a complaint about an advertisement by Orlen, a Polish fuel company. The advertisement referred to fuel which according to the advertisement was supposed to reduce smog.<sup>54</sup> The Committee referred to the duty of advertisers to formulate environmental messages that are as clear and precise as possible. In the opinion of the Committee the obligation was breached by the company as the advertisement did not contain sufficiently clear and documented information. However, the opinion did not recommend the removal or modification of the advertisement, which, up to the date of writing this report, is still available.<sup>55</sup>

Another cases that are worth noting are complaints against PGE Polska Grupa Energetyczna regarding advertising their pro-ecological character. PGE is the owner of the biggest Polish lignite mines (Turów and Bełchatów), the biggest producer of the coal energy in Poland and the biggest single emitter of CO2 in Europe. In the case registry of the Council there are three resolutions on complaints against PGE neither of which was found justified by the Advertising Ethics Committee. The Committee was of

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<sup>47</sup> Article 37 of the Advertising Code of Ethics

<sup>48</sup> Article 38 of the Advertising Code of Ethics

<sup>49</sup> Article 39 of the Advertising Code of Ethics

<sup>50</sup> Section 12 of the Rules of Procedure. Legal entity without having legal personality is a term widely used in Polish legal system. It is a non-statutory. Such entity means an organisational entity that is not a legal person and to which specific legislation confers legal capacity.

<sup>51</sup> Section 49 of the Rules of Procedure.

<sup>52</sup> More on Green Project available at: <https://radareklamy.pl/green-project-new/> [accessed: 05.09.2022].

<sup>53</sup> Position of the Ethics Committee of the Advertising Council on the subject of "eco-labeling", available at: <https://radareklamy.pl/stanowisko-komisji-etyki-rady-reklamy-w-przedmiocie-eko-nazewnictwa/> [accessed: 05.09.2022].

<sup>54</sup> Available at: <https://www.youtube.com/watch?v=x9RfXZm6K70> [accessed: 05.09.2022].

<sup>55</sup> Available at: <https://radareklamy.pl/uchwala-nr-zo-023-22o-z-dnia-23-marca-2022-r-zespolu-orzekajacego-w-sprawach-o-sygn-ker-015-21-i-ker-020-22/> [accessed: 05.09.2022].



the opinion that the advertiser was creating a positive, pro-environmental image in an acceptable manner or that due care was taken to explain how specifically the advertiser intended to achieve the objectives set out in the advertisement.<sup>56</sup> These decisions seem not to take into account Article 35 of the Code according to which advertising referring to specific products or activities may not unjustifiably extend the environmental advertising effect to all of the advertiser's activities.

Furthermore there were few complaints about the advertising of eco-pea coal<sup>57</sup> which described it as an ecological product. However, none of the adjudicating panels found a breach of the Code in using the name 'eco-pea'. Some of the resolutions found though a breach in calling eco-pea 'ecological pea' or 'ecological fuel'.<sup>58</sup> It is worth mentioning that already after these resolutions were passed, the Advertising Council issued a position paper calling for the use of the name 'eco-pea' to be discontinued.<sup>59</sup>

### Misinformation about environmental features of a product and access to environmental information.

Polish law regulates environmental information about a product that has to be disclosed by producers. In this respect, worth noting are provisions of the EPA which introduces obligations to disclose information about products that especially impact the environment.

Article 167 of the EPA regulates by which information a product should be accompanied. The following information should be accessible: the consumption of fuels or consumables, emissions associated with the use of the product and how to environmentally safe use, deconstruct, reuse or dispose of the product. This information should be accessible on the product as well as in the place of sale. The list of the products covered by this obligation is specified in the minister's responsible for the economy regulation, issued in agreement with the minister responsible for the climate. Currently the list covers only chosen categories of vehicles.<sup>60</sup> This narrowing is due to the fact that Article 167 is an implementation of EU regulations.<sup>61</sup>

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<sup>56</sup> Available at: <https://radareklamy.pl/uchwala-nr-zo-019-22u-z-dnia-9-marca-2022-r-zespolu-orzekajacego-w-sprawach-polaczonych-o-sygn-ker-204-21-ker-205-21-ker-206-21-ker-207-21/>; <https://radareklamy.pl/uchwala-nr-zo-134-21o-z-dnia-8-grudnia-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-ker-209-21/>; <https://radareklamy.pl/uchwala-nr-zo-133-21o-z-dnia-8-grudnia-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-ker-208-21/> [accessed: 05.09.2022].

<sup>57</sup> Pea coal is an anthracite coal of a small size used for the production of heat in boilers for purposes of domestic heating. 'Eco-pea' was a trade name for pea coal sold on the retail market, in 2018 'eco-pea' was included in a regulation stipulating quality standards for coal as a specific type of higher quality coal. However, currently the application of this regulation is suspended, which means that the 'eco' prefix has only the character of a trade name and does not guarantee compliance with any environmental standards.

<sup>58</sup> Available at: <https://radareklamy.pl/uchwala-nr-zo-061-21o-z-dnia-23-czerwca-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-akt-ker-066-21/>; <https://radareklamy.pl/uchwala-nr-zo-062-21o-z-dnia-23-czerwca-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-akt-ker-073-21/> [accessed: 05.09.2022].

<sup>59</sup> Available at: <https://radareklamy.pl/uchwala-nr-zo-155-21o-z-dnia-22-grudnia-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-ker-159-21/>; <https://radareklamy.pl/uchwala-nr-zo-126-21o-z-dnia-24-listopada-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-ker-190-21/>; <https://radareklamy.pl/uchwala-nr-zo-059-21u-z-dnia-23-czerwca-2021-r-zespolu-orzekajacego-w-sprawie-o-sygn-akt-ker-072-21/> [accessed: 05.09.2022].

<sup>60</sup> Regulation of the Minister for the Economy and Labour on products subject to mandatory supply of information relating to the protection of the environment of 28 December 2004, Journal of Laws 2005.6.40 (*Rozporządzenie Ministra Gospodarki i Pracy z dnia 28 grudnia 2004 r. w sprawie produktów objętych obowiązkiem zaopatrzenia w informacje istotne z punktu widzenia ochrony środowiska Dz. U. z 2005 r. Nr 6, poz. 40 z późn. zm.*).

<sup>61</sup> Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO<sub>2</sub> emissions in respect of the marketing of new passenger cars

Pursuant to Article 80a of the EPA, the advertisement and promotion containing such information should be clear and contain the requirements specified in Article 167(4) of the EPA. Supervision of compliance with the requirements is carried out by the Trade Inspection.<sup>62</sup> The specific requirements for information to be included in advertising and promotional material can be included in the minister's regulation.<sup>63</sup> The issuance of the regulation is facultative and it has not been issued to date.

The law also provides a sanction for breaching the requirements of Article 80a of the EPA. Advertising or promoting a product violating Article 80a(1) as well as failure to include information set out in Article 80a(2) is a prohibited act subject to a fine.<sup>64</sup>

The rationale to the draft of the act explains that Article 80 of the EPA implements Directive 1999/94/WE regarding the availability of information on fuel consumption and CO2 emissions in respect of the marketing of new passenger cars to consumers.<sup>65</sup> In the explanatory note the legislator even calculated how much would adoption of this law cost. However, authors of this report through access to public information found that that this provision has not been used to the date as there is no minister regulation specifying its requirements.<sup>66</sup>

The authors of this report are of the opinion that the lack of the minister's regulation should not be a barrier to apply the prohibition stemming from Article 80a of the EPA as it is clear and specific enough. It should be also stressed that issuing of the regulation is facultative. Additionally, it should be pointed out that the including provisions with such facultative authorisation to issue a regulation is a common practice of the Polish legislator in the area of environmental law. It should be assessed negatively as the lack of regulation can effectively block application of some legal tools.

When it comes to specific products it should be also noted that Polish law regulates control of environmental quality of paints and varnishes as well as heating boilers.<sup>67</sup> Moreover, placing on the market heating boilers non-compliant with legal requirements is a prohibited act subject to a fine.<sup>68</sup>

## Application of the Aarhus Convention

Aarhus Convention<sup>69</sup> was implemented in the Act on Environmental Information, Public Participation and Environmental Impact Assessments (hereinafter: EIA Act).<sup>70</sup> The act provides access to environmental information that is held by public authorities or information intended for public authorities, unless information concern legislative activities of public authorities and judicial activities

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<sup>62</sup> Article 80b of the EPA.

<sup>63</sup> The regulation – according to Article 80a(2) of the EPA – may be issued by a minister responsible for the economy, in agreement with the minister responsible for the climate.

<sup>64</sup> Article 332a of the EPA.

<sup>65</sup> Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars.

<sup>66</sup> Letter from the President of UOKIK dated 25 August 2022, case number: DPR.0143.388.2022 according to which *'The [...] Article 80a(2) is [...] a statutory delegation to determine, by the minister responsible for economic affairs, the detailed requirements with regard to the inclusion, in advertising and promotional materials, of product information, including, a numerical designation allowing identification of the product or group of products and their names, as well as requirements concerning the legibility of product information. As such detailed requirements have not been defined so far, Trade Inspection has not conducted any inspections in this respect.'* [own translation].

<sup>67</sup> Article 168a and 168b of the EPA.

<sup>68</sup> Article 321k of the EPA.

<sup>69</sup> The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998.

<sup>70</sup> Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko (t.j. Dz. U. z 2022 r. poz. 1029 z późn. zm.).

of courts and tribunals.<sup>71</sup> Anyone can request such information from public authorities. The entity requesting information is not required to demonstrate a legal or factual interest.<sup>72</sup> The law specifies that access to environmental information can be denied only in certain cases – e.g. if the data is protected by regulations on the protection of classified information, if releasing information could endanger the course of pending judicial, disciplinary or criminal proceedings, if it violates intellectual property rights or personal data protections laws as well as to protect public security.<sup>73</sup> Another exception in which authority may refuse access to environmental information is the protection of information of commercial value, including technological data, provided by third parties and covered by the secrecy of the company, if these persons have submitted a request for exclusion of this information from disclosure, containing a detailed justification regarding the possibility of a deterioration of their competitive position.<sup>74</sup> It should be emphasised that for these exceptions, denial of access to environmental information must never be automatic. What is more the public authority has to consider at the first place the public interest in disclosing the information in every case.<sup>75</sup>

In practice, public authorities sometimes misuse this possibility and unlawfully deny access to environmental information – especially in cases of protection of information of commercial value. Public authorities tend to apply this exception automatically if the company claims it is covered by secrecy of the company. However, administrative courts are of the opinion that the company has to prove that it is plausible that releasing such information would deteriorate its competitive position.

This problem was demonstrated specifically in one of the cases conducted by the Frank Bold Foundation in which it requested from the one of chairs of the district executive boards the emission permit for a production plant. The chair shared the permit with the Foundation however it anonymised crucial information such as scale of emissions of particular substances or used odour control devices. These information was crucial for the public as the local community has been complaining for years about the odour coming from the plant and they wanted to control the process of issuing the emission permit. The case is pending.

## General consumer protection laws and its application in environmental cases

There are two regimes of protection of consumers from misinformation and violation of their interest in Polish law. These regimes are closely linked with regulation on the EU level. First of all, the law prohibits practices infringing collective consumer rights. This prohibition can be enforced in administrative proceedings. Second of all, the law regulates prohibition of unfair market practices – enforced in civil proceedings. Below, both regimes are described in more detail.

### Infringing collective consumer rights

Infringing collective consumer interests, an implementation of the Directive 98/27/WE,<sup>76</sup> is regulated in the CCPA. This act prohibits practices infringing the collective interests of consumers<sup>77</sup> which are

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<sup>71</sup> Article 8 of the EIA Act.

<sup>72</sup> Article 13 of the EIA Act.

<sup>73</sup> Article 16 of the EIA Act.

<sup>74</sup> Article 16(1)(7) of the EIA Act.

<sup>75</sup> Poland, Provincial Administrative Court in Warsaw (Wojewódzki Sąd Administracyjny w Warszawie) IV SA/Wa 2854/17, 19 March 2018.

<sup>76</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests

<sup>77</sup> Article 24(1) of the CCPA.

defined as a conduct contrary to the law or morality, in particular breach of the obligation to provide consumers with correct, truthful and complete information, unfair market practices or acts of unfair competition and proposing to consumers to purchase financial services not meeting their needs or otherwise inadequate.<sup>78</sup>

The President of UOKiK initiates proceedings *ex officio* and the entity submitting a notice is not recognised as a party of the proceedings. The President may initiate two types of proceedings: investigative or concerning practices infringing the collective interests of consumers.<sup>79</sup> The goal of investigative proceedings is a preliminary determination on whether there is a case of practices infringing the collective interest of consumers.<sup>80</sup> Moreover, the President can also request the entrepreneur to take a stance in the case before formal initiation of the proceedings.<sup>81</sup>

Anyone may submit a notice of suspected violation of collective consumer interests to the President of UOKiK.<sup>82</sup> The President has to inform such person of steps taken in result of their notice.<sup>83</sup> The notifying person is not entitled to take any legal measures if they are not content with steps taken by UOKiK.

There are not many examples of using this provision in environmental cases. Authors of this report know two such cases – both initiated by environmental organisations.

In the first case ClientEarth Poland Foundation informed the President of UOKiK that using the name eco-pea coal, packaging with plant motifs as well as information on sellers' websites suggesting that eco-pea is environmentally friendly infringes collective consumer rights. The notice was accompanied by the results of an opinion poll, which confirm that a significant proportion of consumers rely on misleading marketing messages from the coal industry, as well as the results of an analysis carried out by scientists from the Warsaw University of Technology, which unequivocally shows that eco-pea coal emits excessive amounts of dust that is harmful to health.<sup>84</sup> In the response the President of UOKiK refused to initiate proceedings stating that eco-pea is the name used in a legal act,<sup>85</sup> therefore, it can be legally used by coal producers, distributors and sellers. Other allegations such as packaging and websites suggesting that eco-pea is environmentally friendly was not referred to by the President.

Another case was initiated by the Frank Bold Foundation in the response to energy prices misinformation spread by companies selling energy. The Foundation informed the President of the UOKiK that two companies selling energy was informing their clients about components of energy prices and reasons why the energy prices had risen indicating that the main reason was EU ETS carbon prices. This information was, however, manipulated. Furthermore, there was no indication in the information provided by the companies that the high carbon cost they have to bear is due to the reluctance of companies to transform their business models and reduce the amount of CO2 emitted. The information was sent to clients by post and e-mails and was published on companies' websites. At first the President of UOKiK informed the Foundation that the information provided by the companies is purely political, propaganda and not commercial in nature. In the opinion of the

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<sup>78</sup> Article 24(2) of the CCPA.

<sup>79</sup> Article 47 of the CCPA.

<sup>80</sup> Article 48 of the CCPA.

<sup>81</sup> Article 49a of the CCPA.

<sup>82</sup> Article 100 of the CCPA.

<sup>83</sup> Article 100(4) and Article 86(4) of the CCPA.

<sup>84</sup> More information available at: <https://www.clientearth.pl/najnowsze-dzialania/artykuly/clientearth-sklada-zawiadomienie-do-uokik-u-w-sprawie-greenwashingu-branzy-weglowej/> [accessed: 5.09.2022].

<sup>85</sup> The regulation of the Minister of Energy of 27 September 2018 on quality requirements for solid fuels, Journal of Laws 1890 (*Rozporządzenie Ministra Energii z dnia 27 września 2018 r. w sprawie wymagań jakościowych dla paliw stałych Dz. U. poz. 1890*). The regulation has been suspended since 29 June 2022 due the situation in the solid fuel market and coal supply problems.

President it would be difficult to demonstrate its impact on consumers' market decisions or their transmission into specific consumer behaviour, what is a necessary element of an unfair market practice.<sup>86</sup> However, after three weeks the President informed the Foundation that he will request the energy companies to submit their stance on the matter and consider starting the proceedings. The change of the authority position was reasoned with a probability that information sent to consumers was untrue and it can have a potential impact on their behaviour and decisions.<sup>87</sup> As for the date of writing this report the President has not taken any final decision in the matter yet.

## Unfair market practices

Unfair market practices are prohibited by the CUMP, which implements Directive 2005/29/EC.<sup>88</sup> Pursuant to the CUMP a market practice is unfair if it is contrary to accepted principles of morality and materially misleads or is likely to mislead the behaviour of the average consumer before, during or after the conclusion of a contract.<sup>89</sup> An unfair market practice is in particular a misleading practice and an aggressive market practice.<sup>90</sup>

A misleading practice is defined as an act which is deceptive in any way if it causes or is likely to cause the average consumer to take a contractual decision that he would not have taken otherwise.<sup>91</sup> A practice which puts unacceptable pressure on the consumer and significantly restricts their freedom of choice is defined as an aggressive market practice.<sup>92</sup>

In case of violation of the prohibition and carrying out of an unfair market practice, a consumer whose interest has been threatened or infringed may request for:

- 1) the cessation of the practice;
- 2) the elimination of the effects of that practice;
- 3) a single or repeated statement of appropriate content and form;
- 4) remedy the caused damage according to general rules;
- 5) award an appropriate sum of money for a specific social purpose related to the promotion of Polish culture, protection of national heritage or consumer protection.<sup>93</sup>

The claim for the cessation of a practice, for a statement and for an award of a certain sum of money for a social purpose can be also filed by the Ombudsman, the Financial Ombudsman, a district consumer ombudsman and an organisation whose statutory aim is to protect the interests of consumers.<sup>94</sup>

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<sup>86</sup> The President of UOKIK answer of 25 February 2022, DAR-4.60.137.2022.PT

Significantly, the notification originally addressed to UOKIK was related to a suspected breach of collective consumer interests, not unfair market practices, which are regulated in another act and described later in the report.

<sup>87</sup> The President of UOKIK answer of 18 March 2022, DAR-4.60.184.2022.

<sup>88</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

<sup>89</sup> Article 4(1) of the CUMP.

<sup>90</sup> Article 4(2) of the CUMP.

<sup>91</sup> Article 5 of the CUMP.

<sup>92</sup> Article 8 of the CUMP.

<sup>93</sup> Article 12(1) of the CUMP.

<sup>94</sup> Article 12(2) of the CUMP.

A lawsuit in this respect is brought before a civil court under the rules laid down in the Code of Civil Procedure.<sup>95</sup> What is crucial, the burden of proof that a given market practice does not constitute an unfair practice lies with the company using a practice.<sup>96</sup>

The example of the application of this provision in practice is the case filed by the ClientEarth Poland Foundation against the seller of the eco-pea coal. The Foundation called on the company to stop the unfair market practice of selling a non-ecological coal fuel product under a name containing the prefix 'eco' and to stop misleading promotional activities that may suggest that burning coal may be environmentally friendly. The case is a continuation of the action taken by the Foundation before the President of UOKIK and is currently pending.<sup>97</sup> The authors and consulted experts are not aware of any other unfair market practices cases which refer to environmental issues.

### Main gaps and intersections

Environmental advertising regulations are very rarely used in practice. Similarly, general consumer protection regulations are not often used in the regards of environmental issues. This is confirmed by a very small number of court verdicts, public information obtained from the UOKIK, as well as conclusions from consultations with experts. Based on interviews with experts as well as the authors' experience, few reasons for this situation may be identified:

- 1) When it comes to the Article 80 of the EPA there are different barriers for administrative and civil way of enforcement. In case of administrative enforcement there is no specific authority ensuring compliance with the prohibition – a lot of different authorities may be competent to take action in specific cases. Moreover, the authorities need a specific legally-based competence to take action in another act than the EPA as its Article 80c is too general in this manner. Another problem is that consumers are not specifically mentioned in Article 80c of the EPA as entities entitled to complain about violations which may cause doubts about their legitimacy to do so. However, the correct interpretation of this provision should indicate that it is only a repetition of general principles regarding the initiation of administrative proceedings or informing authorities about irregularities, and it cannot be understood as a limitation of consumer rights. Nevertheless, this path is not widely known to consumers as it has not been promoted by any competent authority.

On the other hand when it comes to the civil path of enforcement the main problem is the inadequacy of civil proceedings. This is because Article 328 of the EPA which gives environmental organisations standing in such cases is of preventive nature while civil proceedings tend to last very long. Therefore, before the court decides the case, the advertising campaign may be already concluded. As the only remedy the organisation can request is cessation of the advertisement it makes the claim pointless in majority of cases. The potential interim measure is not a solution as it would equal satisfaction of the claim – so it could not be granted, and it comes with high financial risks for the claimant. Moreover, the scope of Article 80 of the EPA is narrowed down to advertising and promotion of goods and services. Therefore, greenwashing information campaigns or practices involving general promotion of the company would not be covered by Article 80 of the EPA.

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<sup>95</sup> Code of Civil Procedure of 17 November 1964, consolidated text, Journal of Law 2021.1805 (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego t.j. Dz. U. z 2021 r. poz. 1805 z późn. zm.*).

<sup>96</sup> Article 13 of the CUMP.

<sup>97</sup> <https://www.clientearth.pl/najnowsze-dzialania/artykuly/clientearth-sklada-pozew-w-sprawie-nieuczciwych-praktyk-rynkowych-stosowanych-przez-producentow-i-dystrybutorow-ekogroszku/>

An additional problem is the civil court's competence to deal with environmental issues that are outside the scope of its normal jurisprudence.

- 2) When it comes to infringement of collective consumers rights, the main problem is the discretion that the UOKIK has to initiate the proceedings. An organisation, a consumer or any other entity notifying of infringement does not have any remedy against negative decision of the UOKIK. The reasoning given by the authority is not always satisfactory. During the interviews, stakeholders pointed to situations such as the failure to take into account all the infringements identified in the notification or the arbitrary interpretation of the average consumer notion.
- 3) In case of regulation on unfair market practices the biggest barrier that was identified is a high threshold to initiate the proceedings. Even though the law provides a reverse burden of proof, civil proceedings are costly and will often involve professional representation. Additionally, the rules on unfair market practices will not apply in cases of regulated or heavily monopolised markets (such as the energy market), as in such cases it is difficult to demonstrate that the trader's action induced consumers to make a particular market choice. The fact that civil proceedings are often excessively long is also a disadvantage of this path.

Consultations with stakeholders unequivocally lead to the conclusion that Polish legal provisions are generally broad enough to cover greenwashing practices. The main problem is unawareness of authorities and their reluctance to take measures. Moreover, the general public awareness of environmental issues and their connection with consumer rights, even though has risen over the years, is rather low. Consumers are not well informed about measures they may take which is also one of the reasons of low number of cases.

On the other hand, desk research and consultations show that the Advertising Council, even though a private, self-regulatory and non-state organisation, receives a large number of complaints about non-environmental advertising. The use of the mechanisms of the Advertising Council is much more popular than the use of mechanisms under binding law. This is an interesting phenomenon, particularly bearing in mind that resolutions of the Advertising Council are not enforceable. This may have the following reasons:

- 1) The rules of the Advertising Code of Ethics, as well as the complaint procedure, are simpler and more understandable for consumers.
- 2) The mechanism is easily searchable on the internet in contrast to statutory mechanisms – in particular the use of Article 80 of the EPA. Moreover, the Council took proactive steps to promote their mechanisms among consumers, e.g. by informing about the mechanism on social media, internet forums and discussion groups. This had tangible results as in 2021 nearly 25% (around 60 cases out of 250 cases in general) of all complaints concerned environmental advertising.
- 3) The Code of Ethics for Advertising contains explicit provisions on environmental advertising and the principles to be followed in it - in the current law, one has to rely primarily on general principles (e.g. unfair market practices or practices infringing the collective interests of consumers), which may not be clear to all consumers and are often subject to conditions that are difficult to fulfil.

Thus, the Advertising Council's self-regulatory complaint system would seem to fill a significant gap in state law at the interface between consumer rights and environmental law. However, in practice the lack of enforcement mechanisms for Advertising Council resolutions, puts their effectiveness into question. From the perspective of consumers, the 'privatisation' of this area of law also poses a certain risk of traders feeling that, in the absence of hard regulation, they need not fear any consequences of their actions. The authors therefore recommend regulating ecological advertising in state law.

Moreover, the analysis of the jurisprudence of the Council shows that their resolutions often contain considerations at a high level of generality, without reference to specific provisions of the Code of Advertising Ethics, and without justification for the choice of a specific sanction (according to the Rules of Procedure for the Consideration of Complaints, this may be: a finding of violation of the Code, a recommendation to remove the advertisement or to modify it). Bearing in mind that, in the absence of hard enforcement mechanisms for resolutions, it is the argumentation contained therein, as well as the power of persuasion, that may be fundamental to the resolution's potential impact, a more in-depth argumentation should be considered.

## 2. Possibilities for collective claims by consumers or representations of collective interests.

Collective claims are regulated in the CCA. They are defined as claims of one type brought by at least 10 persons, based on the same factual basis.

The CCA contains an exhaustive list of claims which can be brought in collective action. It applies to:

- 1) claims for liability for damage caused by a dangerous product;
- 2) tort claims;
- 3) claims for liability for non-performance or improper performance of a contractual obligation;
- 4) unjust enrichment claims;
- 5) personal rights claims arising out of bodily injury or health disorder including claims to which the closest members of the family of the injured party who died as a result of the bodily injury or a health disturbance are entitled. Other personal rights claims are excluded from collective claims proceedings;
- 6) all claims with regard to consumer protection.<sup>98</sup>

Consumer protection cases will be cases involving consumer claims against entrepreneurs arising from various legal bases.<sup>99</sup> The Regional Court in Warsaw stated that consumer protection cases are not limited to claims based on specific consumer laws but cover all consumer cases against business.<sup>100</sup>

In cases involving monetary claims, the action may be limited to a request to establish the liability.<sup>101</sup> The monetary damages is then claimed by each of the claimants in separate proceedings.

In years 2010-2021 there were 319 collective claims cases in civil proceedings – none of them was a case regarding environment. However, theoretically Polish law allow claims related to the environment beyond consumer matters. It could be the following examples:

- Any tort claim based on the general rule from Article 415 of the Civil Code in which claimants' damage is connected to the environmental degradation. In order for the claim to be successful claimants have to prove that the damage is a normal consequence of the act or omission out of which the damage arose.<sup>102</sup> Moreover, claimants have to prove the fault of the defendant. This claim can be brought against any natural or legal person who caused the damage. If the damage is caused by an unlawful act or omission in the exercise of public authority, the entity liable for damage is the State Treasury or a local authority or other legal person exercising such authority.<sup>103</sup>

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<sup>98</sup> Article 1 of the CCA.

<sup>99</sup> Sieradzka, M. (2018) 'Artykuł 1' in: *Dochodzenie roszczeń w postępowaniu grupowym. Komentarz*, Warsaw, Wolters Kluwer Polska.

<sup>100</sup> Poland, District Court in Warsaw (*Sąd Okręgowy w Warszawie*) I C 984/12, 28 February 2013.

<sup>101</sup> Article 2(3) of the CCA.

<sup>102</sup> Article 361(1) of the Civil Code.

<sup>103</sup> Article 417 of the Civil Code.



- A tort claim based on the Article 435 of the Civil Code. According to this provision an operator of an enterprise or plant set in motion by natural forces (e.g. steam, gas, electricity, liquid fuels) shall be liable for damage to persons or property caused to anyone by the operation of the enterprise or plant. This is a strict liability, so the operator will be liable for the damage unless it was caused by force majeure or solely through the fault of the injured party or a third party for whom he is not responsible.
- A tort claim based on the Article 323(1) of the EPA. According to this provision any person who is directly threatened or harmed by an unlawful impact on the environment may require the person responsible for the threat or infringement to restore the situation to a lawful state and to take preventive measures, in particular by putting in place installations or equipment to prevent the threat or infringement. Where this is impossible or excessively difficult, they may require the cessation of the activity causing the threat or infringement. Claims stemming from Article 323 of the EPA are solely of a reparative and preventive nature. A person seeking pecuniary damages has to resort to the general rules of the Civil Code. The provision can be used especially in cases concerned with pollution, noise or odour. The burden of proof lies on the claimant. However, the law trying to even the inequalities in access to crucial information provides that anyone who submits a lawsuit for compensation for damage caused by environmental impact may demand that the court obliges the person/entity whose activity relates to the claim to provide all information necessary to determine the scope of such liability.

According to Article 323(2) of the EPA if the threat or infringement concerns the environment as a common good, the claim referred to in Article 323(1) may be brought by the State Treasury, a local authority or an environmental organisation. It should be noted however, that the environmental organisation cannot be a representative of the group in the class action. NGO cannot also file a lawsuit in such proceedings.

Collective proceedings should be brought by a group representative – it can be either a person who is a member of a group or a district consumer ombudsman. Claimant must be represented by a professional lawyer – an advocate or an attorney at law.

A non-governmental organisation cannot be the representative of the group. In the justification of the draft to the CCA it was explained that “the possibility of a social organisation to be the representative of a group was deliberately abandoned, as these organizations do not have sufficient experience and financial resources to manage such cases. However, if, in practice, granting such a privilege to non-governmental organisations turns out to be advisable, it will be possible to amend the project in order to enable these entities to file group actions”.

When it comes to the Directive 2020/1828, it has not been implemented to the date yet. From the information obtained by the authors through access to public information follows that it is the UOKiK that is responsible for the transposition and no draft of the legislation has been proposed.<sup>104</sup>

### 3. Due diligence and reporting obligation

#### Due diligence

In Poland, there are no provisions regulating due diligence within the meaning of the 'OECD Guidelines for Multinational Enterprises' and the 'Guiding Principles on Business and Human Rights Implementation of the UN Framework Document Protect, Respect and Remedy'. The implementation

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<sup>104</sup> Letter by UOKiK dated 29 August 2022.

of such provisions into Polish law will be likely linked to the implementation of the CSDDD<sup>105</sup>, provided that it is adopted by the EU bodies.

## Non-financial reporting

The Directive 2014/95/EU (Non-Financial Reporting Directive, hereinafter: NFRD) was implemented in the Accounting Act.<sup>106</sup>

The Frank Bold in the cooperation with other partners within the Alliance for Corporate Transparency conducted a research project in which it analysed a number of non-financial reports of the biggest Polish companies. It found out that some entities either fail to comply with the non-financial reporting requirement altogether, or the statements do not contain the necessary elements. The most common failure, however, was the failure to present non-financial information to the extent that it is necessary to assess the development, performance and position of the entity and the impact of its activities on social, labour, environmental, human rights and anti-corruption issues.<sup>107</sup> Thus, in 2020 and 2021 the Frank Bold Foundation filed complaints with the Financial Supervision Commission, in which it informed that several companies obliged to publish their non-financial reports breached their obligations under the Accounting Act, including not sufficient disclosure of climate and environment related issues. The Financial Supervision Commission, which is a current competent authority to supervise non-financial reporting obligations, informed the Foundation that even though they take the reported signals of infringement seriously, it cannot disclose the information of the action taken in this regard. The Commission stated that information on actions taken and arrangements made constitute professional secrecy within the meaning of Article 147 of the Act on Trading in Financial Instruments<sup>108</sup> and may not be communicated to entities other than those expressly designated by law. Therefore, it is not known what was the impact of the submitted complaints. This situation revealed an additional problem as to whether the competent authority to audit companies on non-financial reporting should be a financial supervisory authority that is not adequately prepared to analyse information on, for example, the environment and is bound by a number of regulations on financial markets.

## OECD NCP specific instances regarding environment and consumer interests

An interesting case regarding obligations on non-financial reporting was conducted by the Polish OECD National Contact Point. This was a case submitted by the "Development YES – Open-pit mines NO" Foundation against the multinational company Group PZU S.A. Submitter alleged, inter alia, that the company had not observed Chapter III point 4 of the OECD Guidelines for multinational enterprises regarding insufficient reporting of environmental issues by the company. As a result of the case, the

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<sup>105</sup> Proposal for Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM (2022) 71).

<sup>106</sup> Accounting Act of 29 September 1994, consolidated text, Journal of Laws 2021.217 (*Ustawa z dnia 29 września 1994 r. o rachunkowości t.j. Dz. U. z 2021 r. poz. 217 z późn. zm.*).

<sup>107</sup> See *The Alliance for Corporate Transparency Research Report 2019: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive*, available at: [https://www.allianceforcorporatetransparency.org/assets/2019 Research Report%20 Alliance for Corporate Transparency.pdf](https://www.allianceforcorporatetransparency.org/assets/2019%20Research%20Report%20Alliance%20for%20Corporate%20Transparency.pdf) [accessed: 05.09.2022].

<sup>108</sup> Act on Trading in Financial Instruments of 29 July 2005, consolidated text, Journal of Laws 2022.1500 (*Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi t.j. Dz. U. z 2022 r. poz. 1500 z późn. zm.*).

company undertook to report non-financial information in the future in accordance with the GRI standard.<sup>109</sup>

Another interesting case at the intersection of consumer rights and environmental protection is the case before the National Contact Point submitted by the Frank Bold Foundation against the OLX internet service company, in which the submitter alleged that the company had not observed the OECD Guidelines allowing customers to advertise the sale of furnaces used to burn processed oil and discarded wooden railway sleepers on its portal. As a result of specific instance the parties signed a letter of intent on 25 April 2019, and agreed that the submitter would monitor the content of advertisements and the company would delete advertisements violating environmental protection provisions, while the submitter would support the company in its actions aimed at protecting the environment, aligned with environmental protection and sustainable development principles.<sup>110</sup>

It is important to note that while the OECD Guidelines constitute soft law, their content is increasingly referred to in existing binding regulations<sup>111</sup> as well as in court verdicts on environmental cases.<sup>112</sup> This may mean that the relevance of the Guidelines will grow, also regarding their legal character.

#### 4. Conclusions and ways forward

Even though Polish law contains regulations connecting consumer and environmental laws and its general rules technically provide opportunities for consumers to enforce principles of environmental protection, the practice shows there are many gaps in the system. Stakeholders during the interviews indicated that it is not only regulation that may be problematic but also low environmental awareness of public authorities.

Having that in mind, the authors of this report present the following recommendations.

1. Public authorities should take proactive steps in informing consumers of their rights with respect to environmentally unfriendly advertising. Moreover, more education on greenwashing and campaigns raising environmental awareness are advisable. Consumers should have easy access to information what steps they may take if they encounter greenwashing practices. Public authorities should promote legal steps stemming from binding law as well as out of court proceedings.
2. Regulation on infringing collective consumers rights should be amended to provide a remedy against UOKiK's answer to the notification according to Article 100 of the CCPA. Currently, there is no mechanism of questioning decision of the UOKiK President. This is problematic especially if the President decides not to take steps in particular case as a person notifying UOKiK has no legal means to question such decision. This leaves the UOKiK a considerable level of discretion and consumers with no real legal remedy. Additionally, it is advisable to enable non-governmental organisations, which statutory aim is consumer protection, to participate in the proceedings with the same rights as a party.
3. Moreover, there are problems with the CCPA and CUMP that come from the EU level. As this regulation is a direct implementation of the directive which is subjected to maximum harmonisation, Polish legislator could not make such changes. The main problem lies with the

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<sup>109</sup> Development Yes – Open Pit Mines No! Foundation & Group PZU S.A. specific instance, <http://mneguidelines.oecd.org/database/instances/0006.htm>

<sup>110</sup> Grupa OLX Sp. z o.o. and Frank Bold Foundation specific instance, <http://mneguidelines.oecd.org/database/instances/pl0005.htm>

<sup>111</sup> See Articles 3 and 18 of the Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088

<sup>112</sup> Netherlands, The Hague District Court (*Rechtbank Den Haag*) C/09/571932 / HA ZA 19-379, 26 May 2021.

average consumer model which is interpreted by authorities in arbitrary manner. Consultations with stakeholders showed that authorities tend to interpret it in a discretionary manner – either very narrowly or very broadly – depending on the specific case. Moreover, authors of this report would recommend to broaden the unfair commercial practices black list so that it explicitly covers greenwashing practices. This would be an important step in order to enable consumers and authorities to take measures against such actions.

4. Regarding environmentally unfriendly advertising, some significant changes should be made in order to make this regulation more adequate for its purpose. Firstly, definition of greenwashing should be introduced as Article 80 of the EPA has too narrow scope. It should cover e.g. packaging or internet websites as well as information campaigns presenting the overall picture of the company as environmentally friendly. Secondly, the law should task a specific public authority with controlling compliance with Article 80 of the EPA. This would mitigate fragmentation that currently takes place. Moreover, a specialised entity would be able to deal more effectively and in a more suitable way with infringements. Thirdly, changes facilitating legal proceedings brought by environmental organisations should be made. Article 328 of the EPA which gives environmental organisations standing in such cases is of preventive nature, while civil proceedings tend to last very long. Therefore, before the court decides the case, the advertising campaign may be already concluded. As the only remedy the organisation can request is cessation of the advertisement it makes the claim pointless in majority of cases. It would be advisable to allow organisation to claim e.g. a sum of money for a specific social purpose to be paid by the defendant.
5. Regarding collective claims, it is recommended that Polish regulation enables non-governmental organisations which statutory aim is to protect consumer rights, to be qualified entities for the purpose of bringing representative actions. Moreover, competent authorities should present project of implementation of the Directive 2020/1828 as soon as possible, so they are able to keep the deadline for implementation set out in the directive.
6. Due to the growing legal significance of the OECD Guidelines for multinational enterprises and their penetration into the applicable law and jurisprudence of foreign courts, there is a need for the Guidelines to be recognized by Polish authorities and courts dealing with environmental law and consumer rights. The requirement of a number of entities subject to the obligation to report non-financial information, also in terms of EU taxonomy, to disclose compliance with the Guidelines will be of key importance in this area. Therefore, the question whether the guidelines can be treated as part of the principles of proper social conduct that should be respected by enterprises, as was the case in the Netherlands, should be considered justified.
7. In the absence of existing due diligence regulations in Poland, it will be crucial to adequately implement the CSDDD to enable consumers to monitor environmental compliance in value chains of enterprises.
8. Due to the specificity of information contained in non-financial reports regarding, inter alia, protection of the environment and consumer rights, consideration should be given to entrusting the supervision over the fulfilment of reporting obligations to authorities other than financial supervisory authorities. Experience to date shows that financial supervision authorities do not adequately control the quality of reports. At the same time, there is lack of transparent proceedings and absence of any procedural rights granted to stakeholders, including in particular the right to receive a response by a certain deadline and right to information on the actions taken by the authorities and their results.<sup>113</sup> Handing over supervision to competent authorities and introducing an appropriate, transparent procedure

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<sup>113</sup> See *The Alliance for Corporate Transparency Enforcement activities summary report EUKI Research 2020*, available at: [https://en.frankbold.org/sites/default/files/publikace/enforcement\\_activities\\_corporate\\_sustainability\\_reporting\\_summary\\_research\\_s.pdf](https://en.frankbold.org/sites/default/files/publikace/enforcement_activities_corporate_sustainability_reporting_summary_research_s.pdf) [accessed: 05.09.2022].

is necessary to ensure the effectiveness of non-financial reporting. An opportunity to change the rules in this area will be provided by the implementation of the CSRD.<sup>114</sup>

There are also some promising good practices or solutions which should be pointed out:

1. The self-regulation of the Advertising Council which fills the gap in legislation. Even if there are risks connected with this phenomenon, it is generally a good sign that the market steps in when regulation fails. The practice shows that the mechanism – when actively promoted especially online – is popular among consumers. However, one of the weakest points connected with a self-regulation is lack of an enforcement mechanism. Nevertheless, the popularity of the Council's complaints mechanism shows that such tool is necessary especially for consumers who can have a sense of agency when they see violations in advertising.
2. Article 80 of the EPA should also be assessed positively. Even though there are obstacles in its application, which were elaborated on above, it is a good practice of the legislator who recognises a problem in environmentally unfriendly advertising.
3. Article 323 of the EPA is also a very useful provision as it is broad enough to cover a substantial catalogue of violations and grants standing to NGOs.

As mentioned in the introduction of this report, the authors conducted four interviews. Short summaries of each interview is included below.

The authors interviewed an attorney-at-law from the legal environmental organisation ClientEarth Poland Foundation. She specialises in greenwashing cases and is responsible for the foundation's case against using the misleading name "eco-pea coal". The expert is of the opinion that one of the main obstacles in the administrative proceedings before the UOKIK is the discretion of the UOKIK to initiate the proceedings. When it comes to court proceedings in consumer protection cases neither they are an adequate tool as they have a considerably high entry threshold. This is especially because of financial resources and expertise (or professional lawyer assistance) needed to build a civil case and initiate proceedings.

Another interview was conducted with two specialists from the Advertising Council – the General Director of the office of the Advertising Council and a person responsible for Complaint and administration department. The main take-away from the interview is that active promotion of legal tool and campaigns raising awareness of greenwashing are very effective. The statistics presented by interviewees showed a big increase in inflow of cases in year when the Council was pro-actively promoting its complaints mechanism – especially in social media and on internet forums.

The interview conducted with two representatives from the OECD National Contact Point mainly focused on their experience in promoting the OECD Guidelines for Multinational Enterprises. A lot of attention is paid to the promotion of the guidelines among corporations and raising their awareness of their responsibilities following from the document. The number of specific instances conducted by the OECD National Contact Point is relatively low.

The last interview was conducted with a lawyer who has experience in the theory of consumer law (as he is a lecturer at one of the universities and who is a climate activist as well). He shed some light on development of Polish consumer protection laws and their inherent connection with EU regulation. He especially pointed out that the average consumer model is problematic in practice as it can be interpreted arbitrarily in particular cases. This model however could not be changed on the level of

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<sup>114</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting

national regulation. It has to be approached by the UE legislator as it was introduced on the basis of directives with maximum harmonisation.

UOKiK recognises greenwashing practices as an important issue to address. Interviewees were of the opinion that current law on infringing collective consumer rights contains adequate tools to tackle this problem and that it generally should be within the competence of the consumer protection authority to address such issues. Even though no proceedings in cases related to practices harmful to collective interest of consumers or action against greenwashing has been taken by UOKiK so far, active steps are on their agenda for the 2023. According to interviewees, the reason of the lack of the consumer's complaints is the lack of awareness.